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- C -



# REPORTS OF CASES

IN

## CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS. IN ENGLAND AND IRELAND.

---

EDITED BY

EDWARD W. COX, OF THE MIDDLE TEMPLE,  
*Serjeant-at-Law.*

---

VOL. XI.

1867 TO 1871.

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## REPORTERS.

CRIMINAL APPEAL CASES, before all the Judges, by J. THOMPSON, Esq. ;

CENTRAL CRIMINAL COURT, by W. F. FINLASON, Esq. ;

NORTHERN CIRCUIT, by H. F. THURLOW, Esq. ;

WESTERN CIRCUIT, by T. W. SAUNDERS, Esq. ;

OXFORD CIRCUIT, by JOHN ROSE, Esq. ;

HOME CIRCUIT, by W. F. FINLASON, Esq. ;

MIDLAND CIRCUIT, by H. F. POOLEY, Esq. ;

NORFOLK CIRCUIT, by J. W. COOPER, Esq. ;

IRELAND, by W. MULHOLLAND, Esq. ;

Barristers-at-Law.

REPORTS  
OF  
**Criminal Law Cases.**

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COURT OF CRIMINAL APPEAL.

*November 16 and 23, 1867.*

(Before KELLY, C.B., WILLES, J., BRAMWELL, B., BYLES, J., and LUSH, J.)

REG. v. THOMAS TYSON.(a)

*Perjury—Materiality—False evidence—Alibi.*

*S. was indicted for robbery committed on April 13, at 8.45 p.m., and the prisoner, a witness to prove an alibi on the trial of that indictment, swore that S. was in a house at a distant place at that time, and that S. had lodged at that house nearly two years, and had never been away for more than two or three nights at a time during the period. The prisoner was indicted for perjury on that evidence, and convicted on the assignments of perjury, as to S. having lodged at the house for two years, and never having been away more than two or three nights at a time :*

*Held, that the evidence on these points was material as tending to induce the jury to give greater credit to the material fact of S. being there on the 13th of April at the time in question.*

CASE reserved for the opinion of this Court by the Right Honourable the Recorder of the City of London.

At a session of the Central Criminal Court, held on the 10th of June, 1867, and following days, Thomas Tyson was tried before me on an indictment for perjury.

It was alleged in the indictment and appeared in evidence that, at the May session of the Central Criminal Court, one Owen Sullivan was tried for a robbery, and that upon that trial Tyson

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

REG.  
v.  
THOMAS  
TYSON.

1867.

*Perjury—  
Evidence.*

was called as a witness on behalf of Sullivan. The indictment went on to allege that upon the trial of Sullivan it was material to ascertain whether Sullivan was or was not at a house numbered 20 in Mint-street, in the borough of Southwark, on the evening of the 13th of April, 1867, between the hours of eight o'clock and ten o'clock, and whether Sullivan had lived at same house for two years then last past, or from March, 1865, to March, 1866; and that Tyson falsely swore as such witness, first, that on the 13th of April, 1867, Sullivan came to 20, Mint-street at half-past eight in the evening, and did not go out again that evening; secondly, that Sullivan had lived in the said house for two years then last past; and thirdly, that during the whole of that time Sullivan had never been absent from the same house for more than three nights together.

Perjury was assigned upon each of the above allegations, and the prisoner was convicted on the last two.

The second and third allegations were distinctly contradicted by the oaths of two warders of the Wandsworth House of Correction, who proved that Sullivan was under their charge in that House of Correction from March, 1865, to March, 1866.

The prisoner was undefended, and a question was raised whether the averments of the defendant were material on the trial of Sullivan. Counsel for the prosecution contended that they affected Tyson's credit as a witness on Sullivan's trial.

I reserved the question for the consideration of the Court, whether the two last allegations of Tyson, upon which perjury was assigned, were sufficiently material on the trial of Sullivan to support the indictment for perjury in respect of them.

The defendant is in prison awaiting judgment.

RUSSELL GURNEY, Recorder of London.

At the suggestion of the Court the case was amended by annexing the following copy of the Common Serjeant's notes of the trial of Sullivan.

William Pearce, of 12, Windsor-terrace, said:—On the 13th of April, at 8.45 p.m., I was in the Dover-road going to the train. I was passing Leicester House, felt a man seize me and pull me round, and I looked up and saw the man's face, and two others laid hold of me and pinioned my arms, rifled my pockets, took away my watch, a sovereign and 27s. silver, and then they all ran away, and I fell down. I caught the man's eyes, and am sure he is the man. I got up, ran after them to the corner of Kent-street, and lost sight of them. On the following Tuesday I saw prisoner and five others, and I at once picked him out. He said, "I was not there; it was Bandy and some other." I said, "I know there were two others."

Cross-examined: I am positive. I could not swallow anything for a fortnight, my throat was so pinched. I looked up at the man's face. I never saw him before. I did not see the faces of the others.



William Eldred, P.C. 160 M., said: I took prisoner at the Red Lion, Suffolk-street, and took him to the station. Prosecutor picked prisoner out from six others at once.

Cross-examined: I told him I had a man in custody.

Mr. Cooper addressed the jury for prisoner, and called

Thomas Tyson, who said: I am under-deputy at 20, Mint-street, Borough, a lodging-house. Remember prisoner being taken up. On the Saturday before prisoner came in between eight and nine, and did not go out again. He came in about 8.30; he lay down on a form till 9.45, and then went to bed. He has lodged at the house nearly two years.

Cross-examined: I know it was 8.30 because the prisoner is such a man for larking. The deputy was there at the time. He is not here.

Re-examined: He makes the kitchen merry. Another man followed him. The deputy sent the prisoner away from the fire.

By me: I went to the house in May, 1865. Prisoner lodged there from the time I went, and never was absent more than a night or two, or three at most, at a time. I went out of the kitchen into the room where the clock is to see the time. I do not know why.

Richard Kemp said: I am a warder at the House of Correction at Wandsworth. Prisoner was in Wandsworth prison from March, 1865, to March, 1866.

Certificate of conviction of Sullivan for robbery produced, dated March, 1865; sentenced to twelve calendar months and hard labour at the House of Correction at Wandsworth. Guilty, seven years' penal servitude.

I ordered the witness Thomas Tyson to be taken into custody on a charge of perjury.

*Metcalfe* for the prosecution.—The conviction ought to be affirmed. The evidence was material as affecting the witness's credit, and might, therefore, become the subject of an indictment for perjury: (*Reg. v. Overton*, 2 Moo. C. C. 263; *Reg. v. Gibbons*, 9 Cox Crim. Cas. 105.) [LUSH, J.—If it was only material as affecting the credit of the witness, evidence could not be called to contradict him. BRAMWELL, B.—The evidence may have been material as leading up to the relevant issue.] The evidence was material to test the witness. In 1 Hawk. P. C. c. 19, s. 8, it is said, "that if it appear plainly that the scope of the question was to sift the witness as to his knowledge of the substance by examining him strictly concerning the circumstances, and the witness give a particular and distinct account of the circumstances, which afterwards appears to be false, surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence than his appearing to have an exact and particular knowledge of all the circumstances relating to it."

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Perjury—  
Evidence.

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—  
*Perjury—  
Evidence.*

No counsel appeared for the prisoner.

KELLY, C.B.—I must say that when the case was first submitted to us I had some doubt whether the point was not simply this, could a false statement which went only to the credit of the person making it be the subject of an assignment of perjury. On that point, as a mere abstract proposition, I might have entertained some doubt. But when we look at the whole of the case, as now stated, we find that the counsel for the prisoner on the trial of Sullivan raised the question which depended on the credit to be given to the prisoner's statement. We are all agreed that the statements made by the prisoner on Sullivan's trial were material, on the ground that they tended to render more probable the truth of that allegation on which it was contended he ought not to be convicted. The prisoner first stated that Sullivan was at a place at a time at which, if he had been there, he could not have committed the robbery for which he was being tried; and he followed that up by stating that Sullivan lodged at that place from the time he (the prisoner) went there, and that Sullivan was never absent more than a night or two, or three at most, at a time. Certainly the latter statement goes to render the truth of the first allegation infinitely more probable than it otherwise would have been, and on that ground it was material to the issue. We, therefore, think the conviction should be affirmed.

WILLES, J., concurred.

BRAMWELL, B.—The question is, whether the statements of the prisoner which were proved to be false were material to the issue on Sullivan's trial. Now suppose the prisoner had said that Sullivan was in Mint-street from half-past eight until a quarter to ten on the evening in question. That statement would have been less trustworthy if it had stood alone. Then the prisoner was asked, "What enables you to tell us that?" He replies, "Why, this Sullivan lodged at a house where I lodged, and I know him well and his habits." Those are circumstances which, if true, make the witness competent to speak to the cardinal fact of the prisoner being there at the time in question. Then, why is not such evidence material?

BYLES, J.—If the question had depended on the ground that the evidence was material as affecting the witness's credit, I should have participated in the doubt expressed by the Lord Chief Baron; but, on the other ground, that the evidence was material as rendering the other statement more probable, I agree that the conviction should be affirmed.

LUSH, J.—I was embarrassed at first when the materiality of the evidence was put as affecting the witness's credit, and I was at a loss to see how on that ground it could be material to the issue. But, on the other ground, it is clearly material as being calculated to induce the jury to give credit to the substantial fact deposed to by the prisoner. I, therefore, think that the conviction ought to be affirmed.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 23, 1867.

(Before KELLY, C.B., WILLES, J., BRAMWELL, B., BYLES, J., and LUSH, J.)

REG. v. JOHN STEELS.(a)

*False pretences—Possession of goods obtained by—Evidence.*

*An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value 14s. 6d., of which 4s. 6d. had been paid on account, and 10s. only was due, was a bill of parcels of another coat of the value of 22s. The evidence was that the prisoner's wife had selected the 14s. 6d. coat for him, subject to its fitting him, and had paid 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and the prisoner was then measured for one to cost 22s. When that was made it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner when the coat was given to him handed the bill of parcels for the 14s. 6d., and also 10s. to the prosecutor, saying, "There is 10s. to pay." The bill was receipted, and the prisoner took the 22s. coat away with him. The prosecutor stated that believing the bill of parcels to refer to the 22s. coat, he parted with that coat on payment of 10s., otherwise he should not have done so : Held, that there was evidence to support a conviction on the indictment.*

CASE reserved for the opinion of this Court.

At the General Quarter Sessions of the peace, holden at Peterborough, in and for the liberty of Peterborough, in the county of Northampton, on Thursday, the 17th of October, 1867, before the Right Hon. Sir John Trollope, Bart., and other justices, John Steels was arraigned upon the following indictment :

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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—*Evidence.*

The Liberty of Peterborough, in the County of Northampton, to wit. } The jurors for our Lady the Queen, upon their oaths, present that John Steels, on the 14th day of September in the year of our Lord one thousand eight hundred and sixty-seven, at Peterborough, in the Liberty of Peterborough, unlawfully, knowingly, and designedly, did falsely pretend to one John Miller that a certain bill of parcels of and for a certain coat of the said John Miller, of the value of 14s. 6d., of which 4s. 6d. had been paid on account, was a bill of parcels of a certain other coat of the said John Miller of greater value (to wit) of the value of 1l. 2s., which he, the said John Steels, had had made to measure, and that the sum of 10s. only was the whole sum then due from him, the said John Steels, to the said John Miller for the last-mentioned coat; by means of which said false pretences, and by payment of the said sum of 10s. only, as and for the whole sum of money due to the said John Miller, he, the said John Steels, did then unlawfully obtain from the said John Miller the said last-mentioned coat with intent thereby to defraud; whereas, in truth and in fact the said bill of parcels was not the bill of parcels for the said last-mentioned coat, and the said sum of 10s. was not the whole sum so due and owing for the same coat as he, the said John Steels, then knew, to the great damage and deception of the said John Miller, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

The defendant, John Steels, was tried on the above indictment at the said quarter sessions, and being found guilty by the jury, was sentenced to twenty-one days' imprisonment in the gaol of the said liberty.

After verdict and sentence recorded by the clerk of the peace, defendant's counsel applied to the Court to state a case for the opinion of the Court of Criminal Appeal on the point that the indictment did not, in law, sufficiently allege any offence upon which the defendant was liable to be convicted and punished under the statute in such case made.

It was contended, on behalf of the prosecution, that it was then too late to make such application, and that the objection being only to the form of the indictment, it ought to have been taken on demurrer, or on motion for an arrest of judgment.

On the trial, the order-book of the prosecutor was produced, and it contained the following entry:

"Mr. Steels: Steel Mixture Beaver Frock Coat, 2 large pockets, large bone buttons inside, faced with own stuff, button up to the top, to pay 17s. 6d. paid 4s. 6d., two pockets below the waist, broad back, two pockets above the waist, stitched button cuff, 22 9½, 35 8, 23½, 36, 22½, 37, 8½ back 24, 24½, 23¾, 22¼, 12½, 9 6¾. Sept. 14, fetched his coat, paid 10s. instead of 17s. 6d., balance to pay 7s. 6d."

The bill of parcels mentioned in the indictment was not produced by the prisoner (as required by notice), but it was said by the prosecutor's witness to be in the following form :

Mr. John Steels.		To John Miller, Dr.			
				s.	d.
Sept.	To a Black Coat .....	14	6		
	Cash on account .....	4	6		
				<hr/>	
				10 0	

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*False pretences*  
—*Evidence.*

The evidence was that the prosecutor deals for ready money, and that prisoner's wife looked out the 14s. 6d. coat on the 10th of September, subject to its fitting the prisoner, on his calling at the prosecutor's shop to have it tried on ; that the prisoner afterwards called and tried the coat selected by his wife, when it was found to be too small ; other ready-made coats were then tried, but the prosecutor had none to fit the prisoner (who is a very large man), and the prosecutor's shopman thereupon suggested that a coat should be made for the prisoner ; and patterns of cloth were shown to him and one selected, the price of a coat off which the shopman stated would be 22s. A discussion then took place as to the price, and the 4s. 6d. paid by the prisoner's wife was offered to be returned to the prisoner if he wished, but eventually the prisoner determined to be measured, and was measured for a coat to be made off the cloth he had selected. A day was named when the prisoner was to call and fit on the coat and take it away ; and on the day named he called, and the coat was fitted on by the prosecutor, who had not been present on the former occasion ; and the prisoner, on the coat being given to him, handed a half-sovereign, and the bill of parcels for the 14s. 6d. coat, saying there is 10s. to pay ; which bill the prosecutor handed to his daughter (one of the persons employed in the shop) to examine. Upon this the prisoner put the coat under his arm and was walking out of the prosecutor's shop, when the prosecutor's daughter called him back and said, " Here's your bill," with a receipt which she added to it, being the bill of parcels before referred to.

The prosecutor stated that he said in the prisoner's hearing there must be a mistake, but seeing the bill was in the handwriting of his shopman he thought the mistake might be with him, who was not then present ; and that believing the bill of parcels to be a genuine bill, and that it referred to the 22s. coat, he parted with that coat on the payment of the 10s., which otherwise he should not have done. Prosecutor did not refer to the shop-book containing the aforesaid entry ; but in the evening of the same day mentioned what had transpired to the shopman, and in consequence of what he then learned the shopman the next morning went to the prisoner's house with another witness ; when, addressing the prisoner, he said, " There is an egregious error about the coat," and required payment of 7s. 6d. or a return of

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—*Evidence.*

the coat, offering to repay the 14s. 6d. to him, neither of which the prisoner did, saying he had no money and that he had got a receipt, and they could not hurt him (but which latter statement was not made by either witness at the time of commitment), and the next day the charge was made.

At the close of the case for the prosecution, it was objected by the prisoner's counsel that the facts did not support in law the charge of false pretences as laid in the indictment, but the Court directed him to address the jury, which he did, after which the chairman summed up, drawing the jury's attention to the facts as proved in evidence, and they found the prisoner guilty, and he was sentenced to twenty-one days' imprisonment.

Immediately after verdict and sentence, which was duly recorded, defendant's counsel applied to the Court for a case for the opinion of the Court of Criminal Appeal on the objection before mentioned, and that the indictment did not in law allege an offence under the statute.

It was thereupon urged by the prosecution that it was then too late to make such application, and that the objection to the indictment ought to have been taken on demurrer, or on motion for an arrest of judgment.

The Court of Quarter Sessions, however, decided to grant the case upon the terms that if the Court of Criminal Appeal should be of opinion that the course contended for on the part of the prosecution could only have been taken by the defendant's counsel, the judgment and sentence of the Court of Quarter Sessions should stand; but if it were competent for the defendant's counsel to make such objection when he did, and the said Court of Criminal Appeal should be of opinion that the indictment was sufficient in point of law, then the judgment and sentence should be reversed.

The prisoner was discharged, on recognisance of bail to surrender and abide his sentence in the event of the judgment that day passed upon him by the said Court of Quarter Sessions being confirmed by the said Court of Criminal Appeal.

Dated the 23rd Oct. 1867.

JOHN TROLLOPE,  
Chairman of the said Court of Quarter Sessions.

*Besley*, for the prisoner.—The real question is, whether there was any evidence of a false pretence. No doubt, on the face of the case, there is *primâ facie* some evidence, but none of a false pretence made at the time of the delivery of the coat to the prisoner. The bill of parcels was, in fact, a receipt. [KELLY, C.B.—But it did not cease to be a bill of parcels, because it was also a receipt for cash on account.] The conduct of the defendant is the main thing to be looked at. It does not appear that the 22s. coat was to be a cash transaction, and that was parted with to the defendant before any pretence was made to the prosecutor. The coat was given to him before the defendant handed the half-



sovereign and bill of parcels, and before he said there is 10s. to pay. [KELLY, C.B.—The statement in the case is contradictory on this, for at a later part of it it is said that the prosecutor said, “that, believing the bill of parcels to be a genuine bill, and that it referred to the 22s. coat, he parted with that coat on payment of 10s., which otherwise he should not have done.”] It was not until the coat was in the possession of the defendant that anything was said about payment of the balance. In *Reg. v. Brooks* (1 F. & F. 502), where the prisoner, a carrier, having ordered a cask of ale, and after he got possession of it said, “This is for W.,” Wightman, J., held that an indictment for obtaining it by falsely pretending that he was sent for it by W. could not be sustained. [BYLES, J.—Would this have amounted to larceny of the coat?] No, for possession of it was given to him. [BYLES, J.—Possession was given, as I understand the case, on a misapprehension of the receipt, which misapprehension the defendant adopted. KELLY, C.B.—If the defendant had the coat in his possession, though for a moment only before the defendant uttered any false pretence, can possession be said to have been obtained by the false pretence? WILLES, J.—The possession was only for the purpose of trying the coat on. BYLES, J.—If the prisoner obtained the coat in such a way as to amount to larceny he is not to be acquitted on the trial of the misdemeanor for obtaining it by false pretences (24 & 25 Vict. c. 96, s. 88).] But if the prosecutor knew the pretence to be false when he parted with the coat an indictment for false pretences will not lie: (*Reg. v. Mills*, 7 Cox Crim. Cas. 263.) Moreover, to sustain a conviction for larceny, the indictment for false pretences must set out the facts: (*Reg. v. Bulmer*, 9 Cox Crim. Cas. 492.) And in this case the evidence does not sustain the false pretences alleged in the indictment.

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*Metcalf*, for the prosecution.—The conviction was right. Though the defendant may have had manual possession of the coat at the moment the false pretence was made by him, yet that possession was not such as would deprive the prosecutor of his lien for the price of it. It was only put into the defendant's hands to try on, and in taking it out of the shop under the circumstances the defendant was liable to be indicted as a fraudulent bailee under 24 & 25 Vict. c. 96, s. 3. [KELLY, C.B.—Is there any case where a man going into a shop to buy an article, and having got it into his possession, pays for it with a forged cheque or bill? It seems a misapplication of terms to say that the article was obtained by a false pretence.]

*Besley* replied.

KELLY, C.B.—The majority of the Court are of opinion that there was evidence to go to the jury in support of the prosecution, and that the conviction must, therefore, be affirmed.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 23 and 27, 1867.

(Before KELLY, C.B., WILLES, J., BRAMWELL, B., BYLES, J., and LUSH, J.)

REG. v. GEORGE SMITH. (a)

*Perjury—Evidence—Affiliation case—Summons.*

On the trial of an indictment for perjury, committed on the hearing of an affiliation summons, under 7 & 8 Vict. c. 101, s. 2, it was proved that an information was duly made, which was put in evidence and read, and that the putative father appeared at the petty sessions, and that upon the hearing of the information the perjury assigned was committed. The summons was not produced, nor service of it proved, but in all other respects the proceedings on the hearing of the information were proved and appeared to have been regular :

Held, that it was not necessary that the summons should have been produced to sustain a conviction for perjury on the above evidence.

CASE reserved for the opinion of this Court by Cockburn, C.J.

This was a case tried before me at the last assizes for the county of Leicester, on an indictment for perjury alleged to have been committed by the defendant on the hearing of an information before two justices, on an application by one Louisa Harrison, the mother of an illegitimate child, against one Tom Mee, for an order of affiliation.

The indictment alleged that an information was exhibited before two justices by Louisa Harrison, against Mee, charging him with being the father of her illegitimate child; and that application was made by her to the said justices for a summons against Mee to answer the said complaint; that a summons was accordingly issued by the said justices, and that in obedience to the said summons Mee appeared at a petty sessions to answer the charge. The indictment went on to state the proceedings on

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the hearing of the summons, and alleged in due form that perjury had been committed by the prisoner Smith.

On the trial before me, evidence was given that an information was duly made by the applicant, Louisa Harrison, against the defendant Mee; and the information itself was put in and read.

It was proved that Mee appeared before the justices, and that upon the hearing of the information the evidence, which was the subject-matter of the present indictment, was given by Smith, who was called as a witness by Mee. But the summons was not produced on the trial of Smith, nor was secondary evidence given of its contents, nor was it proved that such summons had been served on Mee.

It appeared that it was the practice to give duplicate summonses to the police constable, whose duty it was to serve the summons. The police constable who served the summons in question not being present at the trial, no evidence of the service of any summons could be given. In all other respects the proceedings before the justices on the hearing of the information were duly proved and appeared to have been regular and correct.

On the close of the case for the prosecution, it was objected, on the part of the prisoner, that the want of proof of a summons, as required by the 7 & 8 Vict. c. 101, having been served on the defendant in the information, was fatal to the present prosecution, inasmuch as the summons formed the basis of the magistrate's jurisdiction.

I declined to stop the case in that stage, and witnesses having been called for the defence, and the case having gone to the jury on the merits, the prisoner was found guilty.

The question which I have reserved, and on which I desire the decision of the Court, is whether the information having been duly proved, as well as the proceedings upon it at the hearing at the petty sessions, the absence of proof of the summons with which the defendant in the information ought, under the statute 7 & 8 Vict. c. 101, to have been served in order to give the justices jurisdiction to hear the information in bastardy, was fatal to the prosecution on this indictment for perjury.

A. E. COCKBURN.

November 23.

*Metcalf* for the prisoner.—The conviction ought not to be affirmed, for the summons should have been produced. That was the foundation of the proceedings, and by the 7 & 8 Vict. c. 101, s. 2, the application of the mother of a bastard child is to be for a summons to be served on the putative father. [LUSH, J.—The case states that a summons was issued, and that in obedience to it Mee appeared at the petty sessions. WILLES, J.—Is it not a general rule that the magistrates have a right to proceed to hear the case if the defendant appears, although there is no summons?]

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—  
*Perjury—*  
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Perjury—  
Evidence.

The production of the summons was necessary to show what the issue was before the magistrates, and so to test the materiality of the perjury assigned. [KELLY, C.B.—Here the information was put in and read.] The information was simply the *ex parte* evidence given on the application for a summons, and is in the nature of a *præcipe* for a writ of summons in a civil action. It is not a substitution for the summons. The summons is a *quasi* record, and the record should be produced to show the materiality of the perjury. *Reg. v. Carr* (*supra*, p. 564) was referred to. In *Reg. v. Newall* (6 Cox Crim. Cas. 21), the defendant was indicted for perjury committed on the hearing of a summons against him as the putative father of an illegitimate child, and it was held necessary to give evidence of the charge either by production of the original order made thereon, or by secondary evidence of the summons after notice to produce it, and that the minutes of the proceedings by the justices' clerk were held not sufficient. So in *Reg. v. Whybrow* (8 Cox Crim. Cas. 439) it was held necessary to produce the summons; and so also in *Reg. v. Hurrell* (2 Fos. & Fin. 271).

No counsel appeared for the prosecution.

*Cur. adv. vult.*

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KELLY, C.B.—We are all of opinion that the conviction ought to be affirmed. This was an indictment for perjury alleged to have been committed on the hearing of an information under the Bastardy Act. It was objected on the trial of the indictment for perjury that there was no evidence of the summons on which the proceedings were founded. We are of opinion that the objection cannot be sustained. A case of *Reg. v. Carr* (decided at these sittings) was referred to, where, by reason of the want of any evidence of the summons or information, or other proceeding which constituted the charge on which the materiality of the alleged perjury was founded, the Court decided that the conviction ought to be quashed; but in this case, although there was no evidence of the summons, yet the information was put in, and it was proved that the defendant appeared at the hearing, when evidence was given on one side and on the other, and the proceedings appear to have been regular. The only question now is, whether, under these circumstances, it was necessary to give evidence of the summons. The summons is merely to bring the defendant into Court; and in this case it appears that the defendant did appear on the hearing of the information. Nothing took place on the hearing of the indictment for perjury which rendered it necessary to refer to the summons, and there having been an information, and the proceedings appearing to have been regular, it was unnecessary to give evidence of the summons. The conviction must therefore be affirmed.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

January 18, 1868.

(Before COCKBURN, C.J., KEATING and SHEE, JJ., PIGOTT, B., and  
M. SMITH, J.)

REG. v. CHARLES NAYLOR.(a)

*Perjury—Materiality.*

*At the trial of an action of trover by P. against prisoner for some steel, the defence was that P., while the steel was lying at a railway station, sent for it and signed a delivery note on receiving it, and then sold it to the prisoner. The prisoner, a witness, swore that the name, P., on the delivery note was P.'s writing, and that he saw him write it. Prisoner was indicted for perjury upon this evidence and found guilty :*

*Held that the signature to the delivery note was material evidence in the action, upon which perjury could be assigned.*

CASE reserved for the opinion of this Court by Mr. Baron Martin.

The prisoner was tried at the late Liverpool Assizes and convicted of perjury.

The indictment alleged that a cause, Alexander Pinder against Charles Naylor (the prisoner) was tried at the Burnley County Court, that it became and was a material question whether the words "A. Pinder" in writing upon a delivery note were the proper handwriting of Pinder, the plaintiff, that the prisoner falsely and corruptly swore that the words "A. Pinder" appearing upon the delivery note were in the handwriting of Pinder, and that he had seen him write them.

It was proved at the trial that the action in the County Court was trover for a small quantity of steel, and the circumstances were these :—

Pinder had, upon the 24th of October, three bundles of steel lying at the railway station at Burnley.

He was a man subject to fits, and was upon that day at a beer-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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GEORGE SMITH.  
—  
1867.  
—  
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The production of the summons was necessary to show what the issue was before the magistrates, and so to test the materiality of the perjury assigned. [KELLY, C.B.—Here the information was put in and read.] The information was simply the *ex parte* evidence given on the application for a summons, and is in the nature of a *præcipe* for a writ of summons in a civil action. It is not a substitution for the summons. The summons is a *quasi* record, and the record should be produced to show the materiality of the perjury. *Reg. v. Carr* (*supra*, p. 564) was referred to. In *Reg. v. Newall* (6 Cox Crim. Cas. 21), the defendant was indicted for perjury committed on the hearing of a summons against him as the putative father of an illegitimate child, and it was held necessary to give evidence of the charge either by production of the original order made thereon, or by secondary evidence of the summons after notice to produce it, and that the minutes of the proceedings by the justices' clerk were held not sufficient. So in *Reg. v. Whybrow* (8 Cox Crim. Cas. 439) it was held necessary to produce the summons; and so also in *Reg. v. Hurrell* (2 Fos. & Fin. 271).

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*Conviction affirmed.*



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*Held that the signature to the delivery note was material evidence in the action, upon which perjury could be assigned.*

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The prisoner was tried at the late Liverpool Assizes and convicted of perjury.

The indictment alleged that a cause, Alexander Pinder against Charles Naylor (the prisoner) was tried at the Burnley County Court, that it became and was a material question whether the words "A. Pinder" in writing upon a delivery note were the proper handwriting of Pinder, the plaintiff, that the prisoner falsely and corruptly swore that the words "A. Pinder" appearing upon the delivery note were in the handwriting of Pinder, and that he had seen him write them.

It was proved at the trial that the action in the County Court was trover for a small quantity of steel, and the circumstances were these :—

Pinder had, upon the 24th of October, three bundles of steel lying at the railway station at Burnley.

He was a man subject to fits, and was upon that day at a beer-

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house kept by the prisoner so drunk that he had scarcely any recollection of what occurred.

A man called Crossley and some others were there also, and Crossley went, by the direction of Pinder (as was alleged), to the railway station, and ordered the steel to be brought and delivered at the house of the prisoner's father, which was nearly opposite the beerhouse.

The steel was accordingly brought and so delivered, and the railway porter then brought to the beerhouse the delivery note mentioned in the indictment, in order that the receipt for the steel might be signed.

The delivery note was in a common form, stating in several columns the name of the consignee, the description of the goods, the weight, the amount of the carriage, and the last column was headed "received in good condition by the undersigned."

Crossley was of necessity called as a witness for the prosecution, and his statement of what occurred was, that upon the porter producing the delivery note a pen was placed in Pinder's hand, but that it was so tremulous he was unable to write, and that he, Crossley, thereupon took the pen and, by the direction of Pinder, wrote the words "A. Pinder" in the last column, and that Pinder put a cross to it; that afterwards Pinder agreed to sell the steel to the prisoner for a sovereign and the discharge of a score for beer.

The prisoner afterwards sold the steel, and the action in the County Court was trover for its conversion, treating the transaction as a fraud and a swindle.

The prisoner was called as a witness for himself at the trial, and repeatedly swore that the words "A. Pinder" appearing on the delivery note as above stated were in the handwriting of Pinder himself, and that he saw Pinder write them.

The perjury assigned was upon this evidence.

At the conclusion of the case for the prosecution, it was objected, by the counsel for the prisoner, that if Pinder really desired Crossley to write his name upon the delivery note and he wrote it by his direction, that it was the same thing as if Pinder had written it himself, and that the charge of perjury could not be sustained.

I overruled the objection and left it to the jury, whether the defendant had falsely and corruptly sworn that the handwriting was that of Pinder and that he saw him write the words as averred in the indictment.

The jury found the prisoner guilty.

It was secondly objected, that the question whether the words "A. Pinder" in the delivery note were in the handwriting of Pinder was not a material one on the trial of the action of trover, so that perjury could be assigned upon it.

The prisoner is out of custody upon bail.

I request the opinion of the Court of Criminal Appeal upon the following questions :—

First. Whether, if Pinder really desired Crossley to write his name upon the delivery note and he accordingly wrote it, the charge of perjury can be sustained?

Secondly. Whether the question, "whether the words 'A. Pinder' in the delivery note were in the handwriting of Pinder" was a material one at the trial of the action of trover, so that perjury could be assigned upon it?

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No counsel appeared to argue for the prisoner.

*Pope*, for the prosecution.—The perjury assigned was material to the issue, it was one step in the proof on which the prisoner relied to show that there had been a sale of the steel: (*Reg. v. Mullany*, 10 Cox Crim. Cas. 97; L. & C. 593; *Reg. v. Gibbons*, 9 Cox Crim. Cas. 105; L. & C. 109.)

COCKBURN, C.J.—The question was whether Pinder had been imposed on by a fraud, he having been in a state of intoxication at the time, and it was essential to ascertain whether the handwriting was his.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 25, 1868.**(Before COCKBURN, C.J., KEATING, J., PIGOTT, B., SHEE, J., and M. SMITH, J.)**REG. v. MOCKFORD. (a)**Larceny—Stealing from a large quantity—Inability to swear to any loss.*

*Prisoner was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl-house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed over night, was found open in the morning. The spot where the prisoner was found was 1200 yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any : Held, that there was evidence to support a conviction for larceny.*

**C**ASE reserved for the consideration of this Court.

At the Quarter Sessions for the county of Warwick, held by adjournment at Coventry, on the 2nd of January, 1868, Robert Mockford was indicted for stealing four fowls, the property of Thomas Orton.

The evidence against him was as follows :—

About one o'clock on the morning of the 6th of December, he was met by a police constable on a highway between his own house and the premises of the prosecutor, and about 1200 yards from the latter, going in the direction of his own house.

On being stopped by the constable, to whom he was well known, he threw down four fowls, dead, but still warm and bleeding, and ran in the direction of his own house.

The ground was lightly covered with snow, which had been falling continuously for an hour, viz., since twelve o'clock, and his footsteps were distinctly visible from the premises of the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

prosecutor to the place where he was met, and thence to his own house.

The constable, having obtained assistance, followed the prisoner to his house, and having, after some delay, gained admittance, found him undressed; his clothes were hanging near the fire. He said he had come home at twenty minutes past eleven o'clock, being about forty minutes before the snow began to fall, but there was snow still unmelted on his boots and his hat, and his clothes were wet.

The knees of his cord trowsers, and the elbows and other parts of his coat were covered with the wet dung of fowls, and there were cobwebs on his hat.

On examining the fowl-pen of the prosecutor (which was in the fold yard) next morning, there was found on the wet dung of the poultry, under the roosts, the marks of the knees of cord trowsers, and other marks as of the elbow of a man leaning on the ground. There were also cobwebs on the lower part of the roof, from three to five or six feet from the ground.

There were fresh feathers on the floor, as if from a fowl's neck; and on being compared with one of the fowls thrown down by the prisoner, from the neck of which the feathers had been removed, they were stated to correspond.

It was proved by the cowman of the prosecutor that, on going into the fold yard at six o'clock on the morning of the 6th of December, he found the door of the fowl-pen and of all the stalls and cowhouses open, they having been closed on the previous night. He also stated that on going into the yard he found poultry already there, their usual habit being to remain in the fowl-pen at that season till about eight o'clock.

The fowls thrown down by the prisoner having been shown to the prosecutor, he stated that, from their general appearance and the peculiarity of their breed, he had no doubt that they were his property, but that he had usually seventy or eighty fowls upon his premises, that he did not know the exact number, and could not undertake to say that any were missing.

The prisoner gave no account of his possession of the fowls, but said to the constable only that he was innocent.

At the conclusion of the case for the prosecution it was objected by the prisoner's counsel—

(1.) That there was no evidence to go to the jury that a larceny had been committed at all on the premises of the prosecutor.

(2.) That there was no evidence that any fowls had been stolen, the property of the prosecutor.

(3.) That in order to prove that a larceny had been committed of the prosecutor's property, there must be some evidence that something had been stolen, and that there was no such evidence in this case.

I overruled the objections, and told the jury that if the whole of the evidence led them to a necessary inference that a larceny had in fact been committed on the premises of the prosecutor—if they

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were satisfied of the identity of the fowls, and if the prisoner's possession of them under the circumstances stated led them to a conclusion that he had stolen them—they might find him guilty, though there was no direct evidence that a larceny had been committed, or that any fowls were missing.

They returned a verdict of guilty.

But being requested by the prisoner's counsel to state, for the consideration of the Court for Crown Cases Reserved, the objections previously raised by him, and to ask their opinion whether in law I was justified in so leaving the case for the consideration of the jury, I discharged the prisoner on recognisance of bail to appear at the next session and receive judgment; and I have respectfully to ask for the opinion of the Court on the propriety of my so submitting the case to the jury notwithstanding the objection so made.

T. C. SNEYD KYNERSLEY,

Deputy Chairman.

*Dugdale* for the prisoner.—There is no sufficient evidence, to support the conviction, that the fowls were the property of the prosecutor, or that any larceny had been committed. [COCKBURN, C.J.—Suppose a man is seen going away with a sack of corn from a barn where a quantity of corn is stored, and that he can give no account of it, and that the prosecutor cannot swear that he has lost a sack of corn, but only that he had a large quantity in the barn like that in the sack, can it be said that there is no evidence of the sack of corn having been taken from the barn?] This is not the same case. The rule is laid down in 2 East P. C. 257, "Although it may be that persons found carrying away improperly sugar or other things from ships or docks where there is a great quantity in bulk may be convicted although the quantity stolen cannot be missed or strictly identified, yet that must be taken to be on account of the difficulty attending identification in the particular cases." But here the prosecutor might have known by counting the fowls whether any were missed.

No counsel appeared for the prosecution.

COCKBURN, C.J.—A larceny was proved in this case. The prisoner is found with dead fowls in his possession, of which he can give no account. He is traced to a farm where the prosecutor kept fowls, and there are feathers on the floor of the fowl-pen corresponding with the feathers of one of the fowls found on the prisoner, from the neck of which feathers had been removed. Is there any jury that would not convict in such a case?

The rest of the Court concurring,

*Conviction affirmed.*(a)

(a) See *Reg. v. Burton* (6 Cox Crim. Cas. 293; 23 L. J. 52, M. C.) The facts in that case were these: On the first floor of a warehouse a large quantity of pepper was kept in bulk. The prisoner was met coming out of the lower room of the warehouse where he had no business to be, having on him a quantity of pepper of the same kind as that in the room above. On being stopped he threw down the pepper and said, "I hope you will not be hard with me." From the large quantity in the warehouse it could not be proved that any pepper had been taken from the bulk. It was objected that as there was no direct proof that any pepper had been stolen the judge was bound to direct an acquittal, but this Court held that without such direct proof of a loss there was evidence to warrant a conviction.

## COURT OF QUEEN'S BENCH.

*April 28, 1868.*

(Before COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ.)

REG v. HICKLIN AND ANOTHER, JUSTICES OF WOLVERHAMPTON, resps. (a)

*Obscene publications—20 & 21 Vict. c. 83, s. 1—Seizure of obscene books—Intention of the possessor—Order for destruction of books.**When an act of Parliament prohibits a certain thing from being done, it is no answer on the part of the person who wilfully does the thing prohibited that he had no improper motive in doing it.**By the 20 & 21 Vict. c. 83 ("Sale of Obscene Books, &c., Prevention Act"), s. 1, it is enacted that it shall be lawful for any two justices upon information that the complainant has reason to believe and does believe that any obscene books are kept in any house for the purpose of sale, and that one or more articles of the like character have been sold, and upon the justices being satisfied that any of such articles are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by warrant to a constable to enter into such house, and to search for and seize all such books, and to carry them before such justices, who are to summon the occupier of the house to show cause why the articles seized should not be destroyed; and upon the hearing power is given to the justices to order such articles to be destroyed accordingly.**The appellant was proceeded against under the act for having in his possession a number of copies of a book called "The Confessional Unmasked," and the justices, upon the hearing, ordered that the copies seized should be destroyed. Upon appeal against this order to the quarter sessions, the Recorder quashed the order, subject to a case for the opinion of the Queen's Bench, which stated, "About one-half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the greater half of the pamphlet is obscene in fact, as containing passages which relate to impure and filthy acts, words, and ideas. The appellant did not keep or sell the said pamphlet*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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*for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlet as a member of the 'Protestant Electoral Union,' to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the confessional. I was of opinion that, under the circumstances, the sale and distribution of the pamphlets would not be a misdemeanor, nor be proper to be prosecuted as such, and, accordingly, that the possession of them by the appellant was not unlawful within the meaning of the statute. I therefore quashed the order made by the said justices, and directed the pamphlets seized to be returned to the appellant :"*

*Held, that the Recorder was wrong, for that the sale of an obscene book—one calculated to corrupt the minds and morals of those into whose hands it may come—is an indictable misdemeanor, even though a good ulterior object was intended to be served by such sale.*

THIS was a case stated by the Recorder of Wolverhampton, upon an appeal by one Henry Scott, against an order made by two justices of the borough of Wolverhampton, under sect. 1 of the 20 & 21 Vict. c. 83 ("Sale of Obscene Books, &c., Prevention Act"), for seizing and destroying a number of pamphlets in the possession of one Henry Scott, called "The Confessional Unmasked."

The case stated that the appellant was a metal broker, carrying on business at Wolverhampton, and was a member of a body styled "The Protestant Electoral Union," the object of which body was "to protest against those teachings and practices of the Romish and Puseyite systems, which are in England immoral and blasphemous; to maintain the Protestantism of the Bible and the liberty of England;" and "to promote the return to Parliament of men who will assist them in those objects, and particularly to expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes." That, in order to promote these objects and principles, the appellant purchased from time to time, at the central office of the society in London, copies of a pamphlet entitled "The Confessional Unmasked," showing the depravity of the Romish priesthood, the iniquity of the confessional and the questions put to females in confession, of which pamphlet he sold between 2000 and 3000 copies at the price he gave for them, namely, 1s. each.

A complaint was then preferred against him before two of the justices of the borough, by a police officer acting under the direction of the Watch Committee of the borough of Wolverhampton, and the justices issued their warrant, under which 252 numbers of the pamphlet were seized on the premises, and ordered by them to be destroyed as obscene books within the meaning of Lord Campbell's Act (20 & 21 Vict. c. 83).



The pamphlet consisted of extracts taken from the works of certain theologians, who had written at various times on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. On one side of the page passages were printed in Latin correctly extracted from the original works, and opposite to each extract was placed a free translation in English. The pamphlet also contained a preface, notes and comments condemnatory of the texts and principles laid down by the authors from whom the extracts were taken. About one-half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the remainder of the pamphlet is obscene in fact as relating to impure and filthy acts, words, and ideas.

The defendant appealed to the quarter sessions, and the Recorder found "that the appellant did not keep or sell the said pamphlets for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlets as a member of the said 'Protestant Electoral Union' to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the confessional."

The Recorder was of opinion that, under the circumstances, the sale and distribution of the pamphlets would not be a misdemeanor, nor consequently be proper to be prosecuted as such, and accordingly that the possession of them by the appellant was not unlawful within the meaning of the statute. He therefore quashed the order made by the said justices, and directed the pamphlets seized to be returned to the appellant.

By sect. 1 of the 20 & 21 Vict. c. 83, it is enacted that "It shall be lawful for . . . any two justices of the peace, upon complaint made before them upon oath that the complainant has reason to believe, and does believe, that any obscene books . . . are kept in any house . . . for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, . . . so as to satisfy such justices that the belief of the said complainant is well founded, and upon such justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such shop . . . with such assistance as may be necessary, to enter in the daytime . . . and to search for and seize all such books . . . as aforesaid found in such house . . . and to carry all the articles so seized before the justices issuing the said warrant . . . And such justices shall thereupon issue a summons calling upon the occupier of the house . . . to appear within seven days

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before such justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier . . . shall not appear within the time aforesaid, or shall appear, and such justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal, as hereinafter mentioned, be given, &c."

*Kydd* for the appellant.—The order of sessions and the ruling of the Recorder were right. According to the view the Recorder took of the facts, the appellant had not brought himself within the operation of the 1st section of the statute; for to justify the seizure, the books must have been of such a nature as that the publication of them would have been an indictable misdemeanor, and to support such an indictment it must be shown that the party had a criminal intent, which in the present case is negatived by the finding of the Recorder. The question is one entirely of intention, and here that is found to be a proper one. A criminal intent on the part of the publisher must be shown to give the justices jurisdiction under 20 & 21 Vict. c. 83, but that is negatived here by the finding of the Recorder. In *Rex v. Woodfall* (5 Burr. 2667) Lord Mansfield says, "That where an act in itself indifferent if done with a particular intent becomes criminal, there the intent must be proved and found. But where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent." The judges in the House of Lords, in answer to questions put to them on Fox's Libel Bill, said, "The crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime:" (22 St. Tri. 229.) The question of intent is for the jury: (*Rex v. Lambert*, 2 Camp. 404; *Rex v. Shebbeare*, 3 T. R. 430, n.) In *Fowler v. Padgett* (7 T. R. 509), it was held that a debtor by leaving his house did not commit an act of bankruptcy though the creditors were delayed, unless there was the intent to delay; and Lord Kenyon said, "It is a principle of natural justice and of our law that *Actus non facit reum, nisi mens sit rea*. The intent and the act must both concur to constitute the crime." The same principle was held to apply in *Reg. v. Sleep* (L. & C. 44); *Reg. v. Dodsworth* (2 Moo. & R. 72); and *Reg. v. Allday* (8 C. & P. 136); *Buckmaster v. Reynolds* (13 C. B. N. S. 62). The mere use of obscene words, or the occurrence of some obscene passages, does not make the work obscene. Otherwise some of our most standard works would be liable to be suppressed. Milton, in one of his celebrated treatises, justifies, by examples, the use of language suitable to the occasion, though it may be obscene. The principle of expurgation practised by

the Church of Rome is condemned in "Hallam's Literature of Europe," part 2, c. 8, s. 70: "Rome struck a fatal blow at literature in the Index Expurgatorius of prohibited books. . . . The first list of books prohibited by the Church was set forth by Paul IV. in 1559. His Index includes all bibles in modern languages, enumerating forty-eight editions, chiefly printed in countries still within the obedience of the Church." If mere obscenity, without reference to the object of the publication, is indictable, Collier's "View of the Immorality of the English Stage" is indictable, though a laudable and successful publication. The same may be said of David Clarkson's works, Bayle's Dictionary, and some of Dryden's poems. Although Savage's poem, "The Progress of a Divine," was considered by many to be obscene, and a criminal information was applied for against him for publishing it, it was argued in his defence that "Obscenity was criminal when it was intended to promote the practice of vice; but that Mr. Savage had only introduced obscene ideas with the view of exposing them to detestation, and of amending the age by showing the deformity of wickedness. This plea was admitted, and Sir Philip Yorke dismissed the information with encomiums on the purity and excellence of Mr. Savage's writings:" (Johnson's "Lives of the Poets.") In *Murray v. Benbow* (Jac. 474, n.), Lord Eldon refused an injunction to restrain the sale of Lord Byron's poem of "Cain" on the ground of its profanity. The object of the publication is to be looked at, and in this case it was to expose the obscenity and grossness of the Romish confessional. In Starkie on Libel (vol. ii. p. 147, 2nd ed.), in treating of blasphemy as a crime, it is said, "A malicious and mischievous intention, or what is equivalent to such an intention in law, as well as morals, a state of apathy and indifference to the interests of society is in such cases the broad boundary between right and wrong." The *animus* must be looked at. In *Moxon's case* (2 Townsend's Mod. St. Tri. 208), Lord Denman, C.J., said, "The purpose of the passage cited from 'Queen Mab,' was, he thought, to cast reproach and insult upon what in Christian minds were the peculiar objects of veneration. It was not, however, sufficient that mere passages of such an offensive character should exist in a work in order to render the publication of it an act of criminality. It must appear that no condemnation of such passages appeared in the context." In *Gathercole's case* (2 Lew. C. C. 254), Alderson, B., said, "A person may, without being liable to prosecution for it, attack Judaism, Mohammedanism, or even any sect of the Christian religion (except the established religion of the country), and the only reason why the latter is in a different situation from the others is, that it is the form established by law, and is, therefore, a part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country. The defen-

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dant here has a right to entertain his opinions, to express them, and to discuss the Roman Catholic religion and its institutions, but he has no right to say of any particular body of persons—*e.g.* the inhabitants of Scorton nunnery—that the place they inhabit is a brothel of prostitution, for in doing that he is attacking the individual characters of the body of whom the nunnery consists.” As noticed in “Campbell’s Lives of the Chief Justices” (vol. ii. p. 512), Lord Mansfield expressed himself thus, “The essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them, may be prosecuted at common law. But it cannot be shown, from the principles of natural or revealed religion, that, independent of positive law, temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship.” The cases of *Lawrence v. Smith* (Jac. Rep. 471) and *Rex v. Read* (Fortes. 100 n.) were then cited. In the present case the publication of this pamphlet is found to have been with the honest intention of exposing the Roman confessional. It is submitted that the intent is material in construing the 20 & 21 Vict. c. 83, and that therefore the order of sessions was right.

*A. S. Hill*, Q.C., for the respondents.—The question is whether the publication was of such a nature as to amount to a misdemeanor. The preamble of the 20 & 21 Vict. c. 83, taken with the enacting part, show that the suppression of obscene publications was intended. It is not necessary that a criminal intent should exist in the mind of the publisher; the illegality must be inferred from the nature of the publication. If the publication is an obscene one, the intention of the party publishing it is immaterial, as it was in the analogous case of *Rex v. Vantandillo* (4 M. & S. 73), where the carrying a child infected with the small-pox through the public streets was held indictable, although it was done without any mischievous intention. Lord Kenyon said, in *Rex v. Topham* (4 T. R. 127), “It was argued that, even supposing there was sufficient evidence of publication, there was no evidence of a criminal intent in the defendant. To this I can answer in the words of Lord Mansfield, in *Rex v. Woodfall*, ‘That where the act is in itself unlawful (as in this case), the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent.’” Lord Ellenborough, C.J., also approved of this principle in *Rex v. Phillips* (6 East 473). In Starkie on Libel (vol. ii. p. 158, 2nd ed.), it is said, “Ever since the decision in *Curl’s case* (2 Str. 788), it seems to have been settled that any publication tending to the destruction of the morals of society is punishable by indictment. . . . Although many vicious and immoral acts are not indictable, yet if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences of a public nature.” The case of *Rex v. Read* (Fortes. 100, n.), in which it was held that the publication of an innocent book was not indictable, has been shaken by *Rex v. Curl*.

COCKBURN, C.J.—We have considered this case, and we are of opinion that the judgment of the learned Recorder of Wolverhampton must be reversed, and the decision of the magistrates affirmed. This was a proceeding under the act of the 20 & 21 Vict. c. 83, whereby it is provided that in respect of obscene books sold or distributed, magistrates may order the seizure of such publications in case they are of opinion that the works in question could have been the subject-matter of an indictment at law, and the magistrates are of opinion that such prosecution ought to be instituted. Now, it is found here as a fact, that the work which is the subject-matter of the present proceeding was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. The magistrates were of opinion that the work was indictable, and that the publication of it was a fit and proper subject for indictment. We must take the latter finding of the magistrates to have been adopted by the learned Recorder who reversed the decision, but not upon that ground. He leaves that ground untouched; but he reversed their decision upon the ground that although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the prosecution, yet that the immediate intention of the appellant was not so to affect the public mind, but to expose the practices and errors of the confessional system in the Roman Catholic churches. Now we must take it upon this finding of the learned Recorder that such was the motive of this publication, that its intention was honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession. Upon that ground the learned Recorder thought an indictment could not have been sustained, inasmuch as to the maintenance of the indictment he thought it would have been necessary that the *intention* should be alleged, namely, that of corrupting the public mind by the obscene matter in question. In that respect I differ from him. I think that if there be an infraction of the law, and an intention to break the law, the criminal character of such publication is not affected or qualified by there being some ulterior object, which is the immediate and primary object of the parties in view, of a different and of an honest character. It is quite clear that the publishing an obscene book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of this country, that there are also very many works indeed the tendency of which is immodest, and, if you please, immoral; and possibly there might have been subject-matter for indictment and prosecution in many works which might be referred to. Now, it is not to be said because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecu-

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tion, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. The very reason why this work is put forward—to expose the practices of the Roman Catholic confessional—is the tendency of questions involving practices and propensities of a certain description to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing, it manifestly must equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy, disgusting, and unnatural description it is possible to imagine. I take it, therefore, that, apart from the ulterior object which the publisher of this work had in view, the work itself is in every sense of the term an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But then it is said, “Yes, but the purpose was not to deprave the public mind; the purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.” Be it so. But then the question presents itself in this simple form—May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is emphatically “No.” The law says you shall not publish an obscene work. An obscene work is here published, and a work, the obscenity of which is so clear and decided that it is impossible to suppose that the man who published it must not have known that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralising character. Is he justified in doing that which clearly would be wrong legally, as well as morally, because he thinks that some greater good may be accomplished? In order to prevent the spread and progress of Catholicism in this country, or possibly to extirpate it in another, and to prevent the State from affording any assistance to the Roman Catholic Church in Ireland, is he justified in doing that which has the immediate tendency of demoralising the public mind wherever this publication is circulated? It seems to me that to adopt the affirmative of that view would be to uphold something which, in my sense of what is right and wrong, would be very reprehensible. It appears to me, the only good that is supposed to be accomplished is of the most uncertain

character. This work, I am told, is circulated at the corners of streets, and in all directions, and of course it falls into the hands of all classes, young and old, and the minds of those hitherto pure are exposed to the dangers of contamination and pollution from the impurity of its contents. And for what? To prevent them, it is said, from becoming Roman Catholics, when the probability is that 999 out of every 1000 into whose hands this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion. It seems to me, the effect of this work is mischievous, and against the law; and is not to be justified because the immediate object of the party is not to deprave the public mind, but it may be to destroy and extirpate Roman Catholicism. I think the old, sound, and honest maxim that "you shall not do evil that good may come," is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good. I think, therefore, the case for the order is made out, and although I quite concur in thinking that the motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act—at any rate that they knew perfectly well that this work must have the tendency which in point of law makes it an obscene publication, namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated, but it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned Recorder has found, that this is an obscene publication. I take it where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act, and that as soon as you have an illegal act thus established, *quoad* the intention, and *quoad* the act itself, it does not lie in the mouth of the man who does it to say, "Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose." The law does not allow that. You must abide by the law, and if you accomplish your object, you must do it in a legal manner, or let it alone. You must not do it in a manner which is illegal. I think, therefore, that the Recorder's judgment must be reversed, and the conviction must be allowed to stand.

BLACKBURN, J.—I am of the same opinion. The question arises under the 20 & 21 Vict. c. 83, "An Act for the more effectually preventing the Sale of Obscene Books," and so forth; and the provision in the 1st section is, that it shall be lawful for a magistrate in a metropolitan district, or for two justices in a country district, "upon complaint made before him or them upon oath, that the complainant has reason to believe, and does believe, that any obscene books," and so on, "are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being other-

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wise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such," the magistrate or justices may, under those circumstances, grant his or their warrant to have the publications seized and destroyed. Now what the magistrates or justices are to be satisfied of is this: that the belief of the complainant is well founded, and also "that any of such articles so published for any of the purposes aforesaid are of such a character and description"—that is to say, of such an obscene character and description; "that the publication of them would be a misdemeanor;" and also that they are "proper to be prosecuted as such;" and, having satisfied themselves of those things, they may proceed to order seizure of the works. So that the justices are to be satisfied of three things—first, that the articles complained of have been and are published; secondly, that they are of such a character that it would be a misdemeanor to publish them; and, lastly, that it would not only be a misdemeanor to publish them, but that it would be proper to be prosecuted as such. Then, and then only, are they to issue their warrant to seize them. I think, with respect to the last clause, that the object of the Legislature was to guard against the vexatious prosecution of publishers of old and standard works, in which there may be some obscene or mischievous matter, as in the case of *Reg. v. Moxon*, and in many of the cases cited by Mr. Kydd. In *Moxon's case* the publication of Shelley's "Queen Mab" was found to be an indictable offence. I hope I may not be understood to agree with what the jury found there, viz., that the publication of "Queen Mab" was sufficient to make it an indictable offence. I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance. There was also a similar attempt to seize Dryden's works in the shop of Mr. Murray, the bookseller. I think the Legislature put in that provision in order to prevent that sort of thing. It appears that the work now in question was published, and the magistrates in petty sessions were satisfied that it was a proper subject for indictment, and their finding was according to the view we entertain. Then there was an appeal to the Recorder in quarter sessions to reverse their decision, in which the appellant was successful. The learned Recorder, in stating the grounds on which he reversed their decision, says (reads the Recorder's statement, concluding), "I was of opinion that, under these circumstances, the sale and distribution of the pamphlet would not be a misdemeanor, nor be proper to be prosecuted as such;" and upon that ground he

quashes the decision, leaving to us the question whether he was right or not. Upon that, I understand the Recorder to find the facts as follows :—He finds that one-half of the work was, in fact, obscene, and he finds that the effect of it would be such that the sale and circulation of it was calculated to prejudice good morals. He does not find that he differs at all from the justices as to that, but he finds that the sale and publication of it would not be a misdemeanor, and consequently, that it would not be proper to prosecute it as such; and his reason for thinking it was not indictable as a misdemeanor is this, that the object of the person publishing it was not to injure public morality, but to expose the errors of the Church of Rome, and particularly the immorality, as he thought it, of the confessional, and consequently upon that ground the Recorder held that it was not indictable. Then comes the question whether the Recorder was right in that, and I come to the conclusion that he was wrong, and that it would be indictable. I take the rule of law to be that which is cited by Lord Ellenborough in *Reg. v. Dixon* (3 M. & S. 11). It is set out in the shortest and clearest way in the 15th page. He says, "It is a universal principle that, when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act." Although he may have had another object in view, however laudable in itself, he must be taken to have intended that which is the natural consequence of the act; and if he does an act which is illegal, it is not made legal by the fact that he did it with some other object. That is not a legal excuse, unless the object was something which rendered lawful the particular act which he did. That is illustrated by the case I referred to of *Reg. v. Dixon*. The question, in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to children unwholesome bread, but without intent to do them harm. The defendant was a contractor, and contracted to supply bread to a military asylum, and he gave to the children bread which was unwholesome and deleterious, and although it was not shown or suggested that he intended to make the children suffer, yet Lord Ellenborough held that he had done an unlawful act in giving them bread which was deleterious, and that he could be indicted for it. So in another case, in which a child who was suffering from a contagious disease, was carried by another person along a public road, to the danger of the health of all those who happened to be in that road, it was held to be a misdemeanor and indictable as such, without its being said that the party committing the offence intended that anybody should catch the disease: (*Rex v. Vantandillo*, 4 M. & S. 73.) If a person carried anybody suffering from small-pox through a crowd, that would be an indictable offence, although he might be perfectly innocent of any wish to infect anybody in that crowd. If, on the other hand, the Small-pox Hospital was on fire, and an individual in endeavouring to save the infected

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inmates from the flames, took some of them into the crowd surrounding the place, although some of the crowd would be liable by his so doing to catch the small-pox, yet, in that case, he would not be guilty of a wrongful act, and he does not do it with a wrong intention. Now, in the present case, the Recorder has found that one-half of this book is obscene, and nobody who looks at the pamphlet can for a moment doubt that it really is so, and that the indiscriminate circulation of it in the way in which it appears to have been circulated, must be calculated and is calculated to prejudice the morals of the people. The object was, to attack and expose the Roman Catholic religion—or practices rather—and particularly the Roman Catholic confessional. It was not intended to injure public morals, but that would be no excuse whatever for the act. I do not think there is anything wrong in taking the view that the Roman Catholics are not right. Any Protestant may say that, without saying anything illegal. Any Roman Catholic may, on the other hand, say, if he pleases, that Protestants are altogether wrong, and that Roman Catholics are right. There is nothing illegal in that. But if the thing is an obscene publication, then, notwithstanding that the wish was not to injure public morality, but merely to attack the Roman Catholic religion and practices, I think the publication would be an indictable offence. The question, no doubt, would be a question for the jury; but I do not think you could so construe this act as to say that, whenever there is a wrongful act of this sort committed, you must take into consideration the intention and object of the party committing it, and if a laudable one, then that would deprive the justices of jurisdiction. The justices must themselves be satisfied that the publication, such as the publication before us, would be a misdemeanor on account of its obscenity and that it would be indictable as such a misdemeanor. The Recorder has found that it is obscene, and he supports the justices in everything except in that which he has reversed it upon. He finds that the object of the appellant in publishing the work was not to prejudice good morals, and consequently he thinks it would not be indictable at all. But I do not understand him for a moment to say, that if he had not thought there was a legal object in view, it would not have been a misdemeanor at all, and that therefore it would have been vexatious or improper to indict it; nor do I think that any body who looks at it would for a moment have a doubt upon the matter. That being so, on the question of whether or not, on the facts that the Recorder has found, it would be a misdemeanor, and proper to be indicted as such, I come to the conclusion that it is a misdemeanor, and that an indictment would lie, and that the justices were right. Consequently, the Recorder's decision is quashed, and the conviction is affirmed.

MELLOR, J.—I confess I have with some difficulty and with some hesitation arrived very much at the conclusion at which my Lord and my learned Brothers have arrived. My difficulty was,

mainly, whether or not this was, under the finding of the Recorder, within the act with reference to obscene publications. I am not certainly in a condition to dissent from the view which my Lord and my learned Brothers have taken as to that; and if that be so, then I agree with what has been said by my Lord and my Brother Blackburn. The nature of the subject itself (if it is a subject which may be discussed at all, and I think it undoubtedly may) is such that it cannot be dealt with, without to a certain extent producing authorities to prove the assertion that the confessional would be a mischievous thing to be introduced into this kingdom; and therefore it appears to me very much a question of degree, of more or less, and if left to the jury it would depend very much on the opinion which the jury might form of that degree in such a publication as the present. Now, I take it for granted, that the justices themselves were perfectly satisfied that it went far beyond anything which was necessary or legitimate for the purpose of attacking the confessional. I take it, that the finding of the Recorder is—as I suppose was the finding of the justices below—that though one-half of the book consists of casuistical and controversial questions, and so on, which may be discussed very well without detriment to public morals, yet that the other half consists of quotations which are detrimental to public morals, and which, in their very nature, would tend to corrupt public morals. On looking at this book myself, I cannot question the finding either of the Recorder or of the justices. It does appear to me, that there is a great deal here which there cannot be any necessity for, in any legitimate argument on the confessional, and the like; and, agreeing in that view, I certainly am not in a condition to dissent from my Lord and my Brother Blackburn, and I know my Brother Lush concurs entirely in their opinion. Therefore, with that expression of hesitation I have mentioned, I agree in the result at which they have arrived.

LUSH, J.—I agree entirely in the result arrived at by my Lord Chief Justice and my Brother Blackburn, and adopt the arguments and the reasonings which they have applied.

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*Judgment for the respondents.*

## COURT OF CRIMINAL APPEAL.

*April 25, 1868.**(Before KELLY, C.B., KEATING, J., M. SMITH, J., PIGOTT, B., and LUSH, J.)**REG. v. MCKALE.(a)**Larceny—False pretences—Property—When not parted with.*

*Prisoner and a confederate went to prosecutor's shop to buy something, and put down a florin in payment. Prosecutor put the florin into the till and placed the change on the counter, which the prisoner took up. The confederate said, "You need not have changed," and threw down a penny on the counter, which the prisoner took up, and put a sixpence in silver and sixpence in copper down, and asked prosecutor to give him a shilling for it. Prosecutor took a shilling from the till, and put it on the counter, when prisoner said, "You may as well give me the florin back, and take it all." Prosecutor took the florin from the till, and put it on the counter, expecting to receive two shillings of the prisoner's money in lieu of it. Prisoner took up the florin and prosecutor took up the silver sixpence, and the sixpence in copper, and the shilling put down by herself, and was putting them in the drawer when she saw that she had only got one shilling of the prisoner's money and her own shilling; but at that moment her attention was diverted by the confederate, and both confederate and prisoner quitted the shop:*

*Held, that this was a case of larceny, for the transaction of exchange was not complete; prosecutor had not parted with the property in the florin.*

**C**ASE reserved for the opinion of this Court at the sessions holden at Nottingham in December, 1867.

Patrick McKale was indicted and tried for feloniously stealing 2s., the moneys of Elizabeth Pickering.

At the trial it was proved that Mrs. Pickering kept a shop for the sale of small articles; that on the 25th of October prisoner and another man not in custody, both strangers to Mrs. Pickering,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

went into her shop, and prisoner asked Mrs. Pickering for a pennyworth of peppermints (sweetmeats), which she served, and prisoner put on the counter a two-shilling piece in payment.

Mrs. Pickering took up the two-shilling piece, and put it into the money drawer, and took out of the same drawer a shilling and a sixpence in silver and five pence in copper, and put these moneys (1s. 11d.) on the counter as the proper change for the two shillings, after deducting the penny for the sweetmeats.

Prisoner took up the 1s. 11d.; and the other man said to prisoner, "What was it you gave her?" Mrs. Pickering replied, "A two-shilling piece." The other man said to prisoner, "You need not have changed;" and at the same time threw down a penny on the counter. The prisoner took up the penny, and put a sixpence in silver and sixpence in copper on the counter, and said to Mrs. Pickering, "Here, mistress, give me a shilling for this." Mrs. Pickering then took a shilling out of the money drawer, and put that shilling on the counter; and prisoner said to her, "You may as well give me the two-shilling piece and take it all." Mrs. Pickering then took from the money drawer the same two-shilling piece she had received from the prisoner, and put that on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. Prisoner took up the two-shilling piece; and Mrs. Pickering took up the silver sixpence and the sixpence in copper put down by the prisoner, and also the shilling put down by herself, and was putting them into the money drawer, when she saw she had only got the silver sixpence and sixpence in copper of the prisoner's money and the shilling of her own money, in exchange for the two-shilling piece; but at the same moment prisoner's companion pointed to some twist sweetmeats, and said to her, "How do you sell that?" and before she could speak prisoner pushed his companion by the shoulders and said, "You don't want any of that;" and both went out of the shop, prisoner taking the two-shilling piece.

Corroborative evidence was given, and prisoner denied being in the shop.

In answer to a question, Mrs. Pickering said she did not intend parting with the two-shilling piece without getting full change for it.

Upon this evidence it was contended by the counsel for the prisoner—

(1.) That upon the facts proved the prisoner could not be convicted of larceny upon the present indictment.

(2.) That Mrs. Pickering parted not only with the possession of the two-shilling piece, but also with the property in it, and therefore there was no larceny.

Upon these objections counsel for the prisoner called upon me not to let the case go to the jury. I refused to stop the case and directed the jury—

(1.) That Mrs. Pickering was deprived of a shilling in value, for



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that the prisoner taking her two-shilling piece left her in exchange only one shilling of his money.

(2.) That, although Mrs. Pickering did put down the two-shilling piece on the counter, intending to part with it in exchange for two shillings, yet that, if the jury believed she intended only to part with it in exchange for two shillings of the prisoner's money, the parting with it by her under the circumstances stated would not be a parting with the property in it, if the jury believed those circumstances to be fraudulently contrived by the prisoner and his companion.

I left it to the jury to say whether the taking away of the two-shilling piece under the circumstances was an error or mistake, and unintentional on the part of the prisoner, or whether they believed that the prisoner and his companion went into the shop intending to defraud Mrs. Pickering, and that they did obtain from her by fraud the two-shilling piece, meaning to steal from her a shilling in value, and if they should be of the latter opinion, I directed them that that was larceny.

Upon this direction, the jury found the prisoner guilty, and a case being demanded, I state this case for the opinion of the Court of Criminal Appeal.

If the Court shall be of opinion that the facts proved do not amount to larceny, and that my direction was wrong, the prisoner is to be discharged; but if the Court think the facts proved do amount to larceny, and that I directed the jury aright, the prisoner is to be brought up for sentence.

BELPER, Chairman.

*J. W. Mellor*, for the prisoner.—The conviction is wrong. It is clear that the prosecutrix parted with the property in the two-shilling piece at the time she put it on the counter and the prisoner took it up. Although she may have handed it to the prisoner under a mistake of facts, the prisoner cannot be convicted of larceny. The two-shilling piece may have been obtained by false pretences, but there was no larceny. As the prosecutrix at the moment, in her then frame of mind, intended to part with the property in the two-shilling piece, it cannot be larceny: (2 Russ. on Crimes, 196.) Where the prosecutor was inveigled by card-sharpers and stripped of a large sum of money, a conviction for larceny was held to be wrong, the property having been parted with by the prosecutor under the idea that it had been fairly won: (*Nicholson's case*, 2 Leach 610.) [KELLY, C.B.—The case states that the prosecutrix put the two-shilling piece on the counter, expecting that she was to receive two shillings of the prisoner's money in exchange for it. The transaction was not complete.] In the ring-dropping case (*Rex v. Patch*, 1 Leach 238) the prosecutor never intended to part with his property.

*Cave*, for the prosecution.—The conviction was right. The transaction was only inchoate and not complete, and the property was not parted with. In *Rex v. Oliver* (4 Taunt. 274), the pri-



soner was indicted for stealing 35*l.* under the following circumstances: The prisoner, having obtained a quantity of gold, went to a public-house in the neighbourhood of Newcastle-upon-Tyne. The prosecutor, who was a groom, and had about him notes belonging to his master to a considerable amount, happened to enter the room where the prisoner was. Soon afterwards the prisoner took an occasion to make a display of his gold, when a conversation respecting it ensued between the prisoner and the prosecutor; the prosecutor expressed a wish that the prisoner would oblige him by some gold in exchange for notes and silver; the gold was not to be purchased at an advanced price, but was to be taken at its legal currency. The prisoner stated that if it would be any material accommodation to the prosecutor, and the prosecutor would do him the same kindness on a future occasion, he would let him have some gold in exchange for notes and silver. This was done to a small amount. The prisoner then said that, if it would be of any material service to the prosecutor, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount; upon this the prosecutor paid to the prisoner 35*l.* in bank notes, which the prisoner took up, and went out promising to return immediately with the gold. The prisoner did not return, and the prosecutor never saw him again till he was apprehended. Upon these facts being proved, Wood, B., held that "the case clearly did amount to larceny, if the jury believed the intention of the prisoner was to run away with the notes and never to return with the gold; and that, whether the prisoner had at the time the *animus furandi* was the sole point upon which the question turned; for, if the prisoner had at the time the *animus furandi*, all that had been said with regard to the parting with the property by delivery was without foundation, as it had, in truth, never been parted with at all. That could only be done by contract, which required the assent of two minds; that there was not the assent of the mind either of the prosecutor or of the prisoner—the prosecutor only meant to part with his notes in the faith of having the gold in return, and the prisoner never meant to barter, but to steal." That was followed by *Rex v. Williams* (6 C. & P. 390), where, on an indictment for larceny, it appeared that the prisoner went to the prosecutor's shop and asked for change for half-a-crown, and two shillings and six penny pieces were given to him, upon which the prisoner held out the half-crown, of which the person giving change caught hold by the edge, but never got it into his possession, and then the prisoner ran off with it and the change also. Park, Allen, J., said: "If the prisoner had only been charged with stealing the half-crown I should have had great doubt, as the half-crown was his own; but he is also indicted for stealing the two shillings and the coppers. He falsely pretends that he wants change for the half-crown, gets the change, and runs off. I think that is a larceny." The cases of *Reg. v. Rodway* (9 C. & P. 784) are to the same

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effect. [KELLY, C.B.—In all these cases the question is, whether the transaction was complete. I own it appears to me that here the transaction was not complete.]

*Mellor* in reply.—In *Rex v. Jackson* (Ry. & Moo. 119), where the prisoner obtained a diamond brooch and other articles and 124*l.* in money from a pawnbroker's shopman by pretending to deposit diamonds on pledge, the judges held, on a case reserved, that this was not larceny, because the shopman, who had a general authority from the master, parted with the property and ownership, and not merely with the possession. And it is said in note v., 2 Russ. on Crimes, 202, wherever the prosecutor parts with the property without expecting it to be returned, the indictment ought to be for false pretences. *Rex v. Williams* was clearly a case of larceny; the prosecutor never intended to part with the change without getting the half-crown. [KELLY, C.B.—Is not that this very case?] There is no parting with the change under a false impression that he had got the half-crown.

KELLY, C.B.—This case has been ably argued, and the question is whether any larceny has been committed. The distinction is well settled between obtaining a chattel by a fraud and stealing a chattel. It is necessary that the transaction should have been complete in order to constitute it a case of fraud; but if it is not complete—if the prosecutor has not parted with the property in the chattel, and the prisoner takes it away with a fraudulent intent—it amounts to a larceny. [His Lordship then repeated the facts.] In effect the transaction was this: The prisoner said, "Let me have my two-shilling piece again, and (it may be so taken) the two shillings you are to have in return for it are now before your eyes." The prosecutrix then took the money from the drawer and put it on the counter, expecting she was to receive two shillings of the prisoner's money in exchange for it. The question is, did she part with the money she placed on the counter? I say certainly not, for she expected to receive two shillings of the prisoner's money in lieu of it. She would have stopped the prisoner if she could while he was leaving the shop. Placing the money on the counter was only one step in the transaction. The act of the prisoner in taking up the money does not affect the question whether the prosecutrix parted with the property in it. The property is not parted with until the whole transaction is complete and the conditions have been fulfilled on which the property is to be parted with. The prosecutrix was in the act of putting the money given by the prisoner in the drawer when she detected the error in a moment, and what would have taken place but for the act of the prisoner and his confederate would have been this: she would have said "you have only given me one shilling of your own money." It is clear that up to that time the transaction of the exchange was incomplete. Then the prisoner, knowing that it was her money and not his, takes off her attention by a trick, and quits the shop with her money. I am of opinion that the property in the two-

shilling piece was not out of the prosecutrix for a moment; that it continued in her, and that the prisoner was guilty of larceny in taking it up and going out of the shop with it. It is the same as if the prisoner had come into the shop and asked for a sovereign in exchange for 18s. in silver and 2s. in copper, and a sovereign had been laid on the counter, and before the prosecutor had had time to count the prisoner's money the prisoner had hurried out of the shop, intentionally leaving something short. In *Rex v. Jackson* the transaction was complete. There was no complete parting with the property in this case, and the prisoner having carried it away fraudulently was guilty of larceny.

KEATING, J., PIGOTT, B., and M. SMITH, J., concurred.

LUSH, J.—For a long time I was under the impression that the prosecutrix had parted with the property in this case; but I now think that the case is susceptible of the view which my learned Brothers have taken of it; and I concur with them in the conclusion to which they have come.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*May 2, 1868.*

(Before KELLY, C.B., KEATING, J., PIGOTT, B., M. SMITH, J., and  
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REG. v. ROGERS AND OTHERS. (a)

*Larceny—Jurisdiction—Transmission of stolen property into another  
county—Railway—24 & 25 Vict. c. 96, s. 114.*

*The prisoner stole a watch in Liverpool, and sent it, with other things,  
by railway, to a confederate in Middlesex:  
Held, that the prisoner was triable in Middlesex, although there was  
no evidence that he had left Liverpool.*

CASES reserved at the Middlesex Sessions for the opinion of  
this Court.

John Rogers, Richard Irwin, Alfred Johnson, and Charles Byatt were tried before me, at the sessions for Middlesex, on the 3rd of March, 1868, for stealing and receiving a watch, the property of John Shaw.

Byatt pleaded guilty.

Rogers was found guilty of stealing.

Irwin and Johnson were found guilty of receiving with a guilty knowledge.

John Rogers resided at Liverpool, and forwarded by railway a box containing the watch in question, and several other stolen watches, to the prisoner Byatt, and the box was delivered in due course to Byatt, in the county of Middlesex.

It was contended that as Rogers was not shown to have left Liverpool, the Court had no jurisdiction to try him.

I told the jury that if they believed Rogers to have stolen the watch, his transmission of it into the county by the agency of the railway was sufficient to give the Court jurisdiction, although he did not personally convey it.

It was proved that Rogers had advised Byatt of the transmission of the box by a letter found in Byatt's possession.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The letter is as follows :—

“ Liverpool, Jan. 30, 1868.

“ I send you up the goods this morning, they are as follows :—

	£	s.	d.
13 W. Leavers	15	12	0
4 W. Genevas	1	12	0
1 R. Leaver	6	0	0
1 R. Geneva	1	5	0
1 Red Case, 1242 dwts.	1	5	0
1 Red Slang, 1oz. 17dwts.	2	5	0
Ditto, 1oz. 2dwts.	1	7	0
	29	6	0

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“ Try and deal this time without so much wrangling. You did not come down as you promised. “ DICK.”

Articles corresponding with this letter were contained in the box found at Byatt's. The box was addressed to his house in the handwriting of Rogers, and a similar box, empty, with similar address in Rogers's handwriting, was found at Byatt's. That box was taken by Rogers to the railway office in Liverpool, on the 13th of January, and booked as a parcel for London. Rogers was asked if he wished to pay the carriage, and he did so. The box was then forwarded in the ordinary manner, the box containing the articles named in the letter (and amongst them the stolen watch in question) was sent by railway in the same manner on the 30th of January at ten o'clock in the morning, but the railway clerk could not say by whom it was brought to the office.

Irwin and Johnson were proved to have been at Byatt's house on the arrival of the box, and the jury found that they knew of the box and the contents having been forwarded by Rogers, and that they were present on its arrival, aiding and abetting Byatt in the receipt of the watch in question, they well knowing it to have been stolen, but it was not proved that either of them had manual possession of it, all the prisoners, Byatt, Irwin, and Johnson having been taken into custody before the box was opened.

It was proved that the watch in question was stolen from the owner at Liverpool on the 29th of January, about seven o'clock in the evening, and when found at Byatt's the bow of the watch had been broken off.

Rogers was the keeper of a beer-shop at Liverpool, and there were found in his house a number of watch-keys, a jeweller's eye-glass, and jewellers' scales and weights. Being asked by the officer what such things were used for, he laughed, and said “ you know as well as I do.”

I have to ask this honourable Court whether, upon the facts here stated, the conviction of Rogers, Irwin, and Johnson, or either of them, can in point of law be sustained?

Rogers was sentenced to be kept in penal servitude for five

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years, and Byatt for ten years. Irwin and Johnson were sentenced to be severally imprisoned with hard labour for two years; and the prisoners remained in the House of Correction for the county of Middlesex, in pursuance of the above sentences.

WM. H. BODKIN,  
Assistant Judge.

Middlesex Sessions, March 10, 1868.

No counsel was instructed for the prisoners.

*Collins*, for the prosecution.—The jury having found Rogers guilty of stealing the watch, and he having it in his possession by his agents, the railway company, in the county of Middlesex, the Middlesex Court of Quarter Sessions had jurisdiction to try him for the felony: (24 & 25 Vict. c. 96, s. 114.) The case is like that of *Reg. v. Cryer* (7 Cox Crim. Cas. 335), where the half of a country bank note having been stolen at some period during its transfer from S. in Wilts to Bristol, it was afterwards inclosed by the prisoner in a letter addressed to the bankers at S. demanding payment, which letter was posted at Bath. There was no other evidence of any receipt or possession by the prisoner in Wilts: and it was held that the prisoner was rightly tried in Wilts, as the possession either of the post-office servants or the bankers was his possession. *Reg. v. Jones* (1 Den. Cr. C. 551) was referred to in that case, and it was there held that the postmaster became the agent for the prisoner, so as to render him liable to be tried in the county where the letter containing money was posted by the prosecutor to him, he being indicted for obtaining the money by false pretences. As against the other two prisoners, Irwin and Johnson, the verdict is conclusive.

KELLY, C.B.—In this case, as regards the prisoner Rogers, who was convicted of stealing a watch at the Middlesex Court of Quarter Sessions, it appears that the watch was stolen at Liverpool, and forwarded by railway to London to another prisoner, Byatt (who pleaded guilty), for the purpose of sale. The question arises, whether the possession of the watch, when it was in the county of Middlesex, in contemplation of law, must be taken to have remained in Rogers, who originally stole it at Liverpool? Upon that point *Reg. v. Cryer* is a conclusive authority; but, independently of that authority, I think that the constructive possession of Rogers by the railway company in Middlesex was, for criminal as well as civil purposes, equivalent to actual possession by him. The conviction must therefore be affirmed. As regards the other two prisoners, Irwin and Johnson, the verdict of the jury, that they were aiding and abetting Byatt in the receipt of the watch, makes them principals in the commission of the offence.

The rest of the Court concurred.

*Conviction affirmed.*

## WESTERN CIRCUIT.

*Bodmin, March 16, 1868.*

(Before BOVILL, C.J.)

REG. v. JANE GEORGE.(a)

*Concealment of birth—Secret disposition of the body.*

*Leaving the dead body of a child in two boxes, closed, but not locked or fastened, one being placed inside the other in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a "secret disposition of the body" within the meaning of the stat. 24 & 25 Vict. c. 100, s. 60.*

JANE GEORGE was indicted for unlawfully endeavouring to conceal the birth of her child by secretly disposing of the dead body of such child by placing the same in a certain box in a certain room, &c.

The prisoner was an assistant in a draper's shop, and it appeared from the evidence that she was delivered of a full-grown child on a Sunday afternoon, when most of the inmates of the house were absent. On being questioned by her mistress next morning as to what was the matter, she said she had had a miscarriage. Her mistress then asked where it was? Prisoner replied, "It was only a six-months' miscarriage, and it had been thrown away in the slop-pail." The prisoner also made similar statements to the surgeon who was brought to her by her mistress. The contents of the slop-pail, which had been removed from prisoner's bedroom by a servant about an hour after her delivery, were found to consist of blood and clotted matter, but no after-birth was found. Two days after her delivery the prisoner was requested to leave the house. Soon after she was gone, a servant girl, on going into a bedroom near that which had been occupied by the prisoner, saw an old dress hanging partly out of a large box in which old clothes were kept; a hat and bonnet had also been taken out of the box and thrown on the floor; the lid of the box was not quite closed, but kept up a little by a smaller box, which had been placed inside it on the top of the old clothes; the smaller box

(a) Reported by E. W. Cox, Serjeant-at-Law.



REG. (which was well known to belong to the prisoner) was found to  
 v. contain the dead body of a full-grown child. Neither of the  
 JANE GEORGE. boxes were locked nor fastened in any way. Some baby-linen  
 — was afterwards discovered in a drawer in the prisoner's bedroom.  
 1868. *H. T. Cole*, Q.C. (*Folkard* with him), for the prisoner, contended  
 Concealment of that upon this evidence the prisoner could not be convicted of  
 birth. secretly disposing of the dead body, within the meaning of the  
 stat. 24 & 25 Vict. c. 100, s. 60.

BOVILL, C.J.—I am entirely of that opinion. It seems as if the child was put in the box for the purpose of being discovered, instead of being secretly disposed of. It was known that the prisoner had a miscarriage, and that being so, she goes away and leaves the body of the child; and, assuming that she placed it in the box, it appears to have been put there as if purposely to invite some one to look for it, and where some one must of necessity discover it. Neither of the boxes being locked nor fastened in any way, it amounts to no more covering than for decency's sake. It was put in a room which was much resorted to by persons in the house, and the box arranged in such a manner as to attract attention; and the smaller box was known to belong to the prisoner. It may therefore be naturally expected that the discovery would be made.

The learned judge then asked the jury if, upon the facts proved, they were of opinion that the body was placed in the boxes for the purpose of concealing the birth, or for attracting attention; and the jury replied, that they found "it was put there for the purpose of attracting attention."

*Not guilty.*

## WESTERN CIRCUIT.

DEVON SPRING ASSIZES, 1868.

*Exeter, March 10.*

(Before Mr. Justice BLACKBURN.)

REG. v. RICHARDS. (a)

*Threat—Evidence—24 & 25 Vict. c. 96, s. 47.*

*Whether the crime of which the prisoner was accused by the prosecutor was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money. But it is material in considering the question whether, under the circumstances of the case, the intention of the prisoner was to extort money, or merely to compound a felony.*

**P**RISONER was indicted under sect. 47 of 24 & 25 Vict. c. 96, for threatening to accuse the prosecutor of an infamous crime with a view to extort money.

*Collins* for the prosecution.

*Carter* for the prisoner.

The facts proved were, that the prisoner had been informed by his son that the prosecutor had communicated to him the venereal disease by sodomite practices; that the son had, in fact, such a disease; that the prisoner thereupon went to the prosecutor, and at first demanded payment of the doctor's bill, amounting to 25s., but some time afterwards threatened to give him into custody unless he would compromise it by payment of 100*l*.

BLACKBURN, J., to the jury.—Whether the crime charged upon the prosecutor by the prisoner was or was not one in fact is not material in this, that if the prisoner intended to extort money by threatening to make the accusation, he is equally guilty whether it was or was not true; but it is material for you in considering what was the intention of the prisoner in demanding the money. If the prisoner believed the statement of his son, and, acting on that belief, went to the prosecutor and accused him of the crime, but without any purpose at that time to extort money by such

(a) Reported by E. W. Cox, Serjeant-at-Law.

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accusation, he had not been guilty of the offence laid in this indictment; and if, after the accusation is made, with a belief in its truth, the prisoner endeavoured to compromise it by payment of money, he might be guilty of the offence of compounding a felony, but he would not be guilty of obtaining money by threats.

*Not guilty.*

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## Ireland.

### DUBLIN COMMISSION COURT, GREEN-STREET.

*February 10, 1868.*

(Before FITZGERALD, J., and DEASY, B.)

REG. v. ALEXANDER MARTIN SULLIVAN.  
REG. v. RICHARD PIGOTT. (a)

*Sedition and seditious libel—Definition and description—Seditious writings copied from foreign newspapers—Intent of publication.*

*Liberty of the press means complete freedom to write and publish without censorship or restriction, save such as is absolutely necessary for the preservation of society.*

*When any writing appears to the jury to exceed these limits, it is a seditious libel. "A man may publish whatever a jury of his countrymen think is not blamable." But the judge will advise the jury that those writings are seditious which are calculated and intended to excite hatred or contempt of the Government or the administration of the laws, or to violate the constitution, or to promote insurrection, or create discontent, or bring justice into contempt, or embarrass its functions. Governments and courts of justice may form the subject of criticism and censure, but corrupt motives are not to be imputed. Yet, juries are not to adhere to the letter of any definition of seditious libel, but to consider the surrounding circumstances. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. It would also be its duty to complain of a grievance which the public good required to be removed, though the very assertion of a grievance*

(a) Reported by W. MULHOLLAND, Esq., Barrister-at-Law.

*creates discontent to a certain extent. Such writings, though trenching closely upon sedition, should receive the protection of a jury.*

*The law does not excuse the publication in newspapers of writings which are in themselves seditious libels, merely because they are copied from foreign newspapers as items of news. This will be a matter for the jury in considering the criminal intent; but they must also consider the circumstances under which the writings were copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, the nature of the editorial comments accompanying them, if any, or their absence, if none, the general tone of the other writings in the newspaper, as the intent of the publisher is to be inferred from the natural consequences of his act.*

*Every person must be taken to intend the natural consequence of his own deliberate act, and therefore the law will not excuse a journalist or newspaper writer on the ground that he writes for hire merely, or that the commercial interests of his paper required the publication of the writings in question.*

**I**N these cases the defendants were indicted for printing and publishing certain seditious libels upon Her Majesty's Governments in their newspapers—the *Weekly News* and the *Irishman* respectively.

FITZGERALD, J., in the course of his address to the grand jury for the county of Dublin, made the following observations bearing upon these cases:—I have now to direct your attention to two cases of great public importance, in which the Attorney-General prosecutes the publishers of two weekly newspapers for a series of printed articles alleged to be seditious libels of a very dangerous character. As such prosecutions are unusual, I think it necessary, in the first instance, to define sedition, and point out what is a seditious libel. Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder. Sedition, being

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inconsistent with the safety of the State, is regarded as a high misdemeanor, and, as such, punishable with fine and imprisonment; and it has been truly said that it is the duty of the Government, acting for the protection of society, to resist and extinguish it at the earliest moment. The indictment for sedition must specify the acts—the overt or open acts, by which the seditious intent was evidenced, and in the cases to be specially submitted for your consideration, the acts relied on as indicating the seditious spirit of the accused party are certain newspaper publications, which are alleged to be “seditious libels.” It is scarcely necessary to point out that to accomplish treasonable purposes, and to delude the weak, the unwary, and the ignorant, no means can be more effectual than a seditious press. With such machinery the preachers of sedition can sow wide cast those poisonous doctrines, which, if unchecked, culminate in insurrection and revolution. Lord Mansfield likened a seditious and licentious press to Pandora’s box—the source of every evil. Words may be of a seditious character, but they might arise from sudden heat, be heard only by a few, create no lasting impression, and differ in malignity and permanent effect from writings. Sir Michael Foster said of the latter: “Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the court naked and undisguised, as they came out of the author’s hands.” I am confident you will concur in the force and justice of the observation of that learned judge. I will now turn to the case of *Reg. v. Richard Pigott*, the publisher of a newspaper called the *Irishman*. The indictment against him contains seventeen counts, and charges him with publishing in that paper twelve distinct seditious libels. The publications may be divided into three classes—(1.) Original articles; that is, those which appeared first in that paper. (2.) Articles taken from American or other papers, and republished in the *Irishman*. (3.) Articles, some original and some American, relating to the Manchester executions. As to the articles extracted from American or other papers, it was recently contended by the counsel for Mr. Pigott, in the Court of Queen’s Bench, that even if these articles were of a seditious or treasonable character, yet that the defendant was justified in publishing them as foreign news. I am bound to warn you against this very unsound contention, and I may now tell you, with the concurrence of my learned colleague, that the law gives no such sanction, and does not in the abstract justify or excuse the republication of a treasonable or seditious article, no matter from what source it may be taken. In reference to all such republications the time, the object, and all the surrounding circumstances are to be taken into consideration, and may be such as to rebut any inference of a criminal intention in republication. If, for instance, one of the leading newspapers should in

good faith publish the proceedings of a foreign conspiracy, with a view to communicate intelligence or a warning to the nation, accompanying it with proper editorial comments, the circumstances would, in every rational mind, negative the idea of any seditious design. If, on the other hand, at a period of great political excitement, when a treasonable confederacy existing amongst them was urging the deluded people to armed insurrection, a journal was found habitually devoting a considerable portion of its space to the republication from a foreign source of treasonable or seditious articles addressed to the people of this country, without one word of warning, or one note of disapproval, then it would be reasonable to infer that the publisher intended what would be the natural consequences of his acts—namely, to promote some seditious object. If the law be powerless in the case of such publications, then we may as well blot out from the statute book the chapter on seditious libel, which would take away from society the great protection which the law affords to their institutions. I will give an illustration of this. In 1865, the Government of the day with a strong hand and a vigorous movement suppressed a paper published in this city under a name you ought not to forget—the *Irish People*. That paper was specially devoted to the treasonable purpose of promoting the objects of the Fenian conspiracy, and the main evidence given against the parties tried in 1865 consists of articles published in that paper. Under the same name, and advocating the same views, a paper was soon after established in New York, and I believe still exists there, and of what avail would be the suppression of the *Irish People* in Dublin if one of the local papers here was justified and permitted by the law to republish the treasonable articles of the paper in New York? You see, therefore, how necessary it is to assert this part of the law, and therefore I again emphatically tell you that it is no justification or excuse for a publication, treasonable or seditious, that it appeared first in another paper, whether local or foreign. I wish to be particularly plain on this. Some of the publications complained of in this case do not come properly under the head of news or intelligence, but are actually of the class commonly known as “leaders.” You should not, however, rest anything on that if in other respects the publications were found to be innocent or excusable. I will ask you for a moment to consider some of these publications. The crime laid is the intent, and you can only find a bill against the accused when you come conscientiously to the conclusion—assuming you find the articles to be seditious—that they were published with the intent laid in the indictment—namely, to spread, stir up, and excite disaffection and sedition amongst the Queen’s subjects, to excite hatred and contempt towards Her Majesty’s Government and administration, to encourage, foster, and keep alive the Fenian conspiracy, to spread information and intelligence respecting that conspiracy amongst its members in this country, and to keep them and

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other evil-disposed persons well informed of the acts and proceedings of their brother conspirators in America. The intention charged is varied in each count. You will have fourteen or fifteen articles before you, and you must determine on each of them. One you may think seditious, another not, and you will find your bills accordingly. I will not call your attention to these articles in detail, I will only advert to two or three. The first is a letter dated New York, 4th of June, 1867, purporting to be written by some person who had been in this country, and according to his representation was here in March, 1867, when there was an actual insurrection, which was happily and speedily put down. The writer, after adverting to this, says the redemption of their common land mainly depends upon Irishmen there, and if they continued to work as their brethren in Ireland expect they will, the stamping out of Fenianism would be something too difficult "for the British manslayer of Sepoy notoriety." Again, alluding to the country before the 5th of March, the date of the insurrection, the writer said, the whole people were animated by one single thought—the thought of the "coming struggle." Smiths were at work everywhere. Then he described the pikes being made, and he had no doubt that if the Irishmen in America did their duty they would be successful, and that the people did not believe the cause to be lost, but would fight. This letter was addressed to the Fenian organ in New York. I will now direct your attention to the leading article called "The Holocaust," and though I do not intend to read it in detail, it will be your duty to do so. The article is one of great literary ability, written by a person accustomed to write, and capable of writing with great power, and which is all the more mischievous on that account. The article commences in this way: "Deaf to all warnings, however ominous, spurning alike the argument of the just and the prayer of the merciful, the Government of England has this day done a deed of blood which shall overshadow its name before the whole world." After some more writing in this strain, the article proceeds: "Allen, Larkin, O'Brien. In these words, written large and deep, written in letters of blood, read the mercy and justice of England. They died far from the land they loved, far from the nation they fain would have served, foully slandered by the organs of a sanguinary aristocracy. Dead! dead! dead!!! But there are those who think that in death they will be more powerful than in life—there are those who will read on their tombs the prayer for an avenger to spring from their bones." You will recollect that the Manchester trials took place in October, and that the execution of the unfortunate and unhappy men took place in November. The article is a declamation against the justice and mercy of England, and as to these men perishing to gratify a sanguinary aristocracy; but the writer seems to have forgotten that one thing had intervened which probably tied the hands of the administration and shut the door of mercy—I mean the Dublin assassinations on the



31st of October. The only other article I will call attention to was in the form of a letter of a Roman Catholic parish priest in the county of Clare, and to this I will ask you to give a fair and liberal interpretation in reference to the charge that it was written with intent to excite disaffection and sedition amongst Her Majesty's subjects, and to bring the law and Government into contempt. I ask your special attention to this because a great deal of the letter will be found to be rather an attack upon the land system than upon the Government and the law generally. I will only read the concluding passage of the letter, which I believe contains a misprint, as the writer, if he was a Roman Catholic clergyman, could hardly make the mistake committed. The passage was this: "To the strong arm and the great soul I would unite prayer to the Great Eternal Being who elevates a nation for its justice, and prostrates kingdoms and people for their iniquity, who opened the heavens to Judas Maccabeus, and guided the hand of the saintly heroic woman of Apulia who smote the tyrant and freed her country." Who the "woman of Apulia" was puzzled me for a considerable time. I recollected, however, the great scriptural character who smote the tyrant and freed her country—Judith, the woman of Bethulia, who smote Holofernes, the tyrant who, in the strong language of Scripture, "wasted the kingdoms of the West." I will not comment further on the publications; they will be all laid before the jury, and I am sure will receive a most careful consideration. With respect to the question of the freedom of the press, I feel bound to say a few words. Since 1692 there was complete liberty of the press in Great Britain and Ireland. By liberty of the press I mean complete freedom to write and publish without censorship and without restriction, save such as was absolutely necessary for the preservation of society. Our civil liberty is largely due to a free press, which is the principal safeguard of a free State, and the very foundation of a wholesome public opinion. Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretence of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions. In dealing with the case before me, I will tell you that political or party writing, when confined within proper and lawful limits, is not only justifiable, but is protected for the public good, and such writings are to be regarded in a free and liberal spirit. A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives; with the same motives a writer may freely criticise the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when

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plainly and deliberately the limits are passed of frank and candid and honest discussion. It was truly said, the liberty of the press is dear to all of us, and sure I am that, although that liberty may be abused, its true freedom never will be diminished or endangered so long as you, the grand inquest of the country and the petit jury stand between the press and arbitrary power. Lord Kenyon has quaintly said, "a man may publish whatever a jury of his countrymen think is not blamable." In ordinary cases the facts are for the jury and the law for the judge; but in cases of libel, and with a view to the true freedom of the press the law casts on the jury the determination of both law and fact. You are to determine whether or not the publications in question are or are not seditious libels. I desire to impress this on you in the plainest language. You are the sole judges of the guilt or innocence of the defendant. The judges are here to give any help they can, but the jury are the judges of law and fact, and on them rests the whole responsibility. In this sense the jury are the true guardians of the liberty of the press. In dealing with the question whether the articles were published with the seditious intention charged in the indictment, you will fairly consider the surrounding circumstances, coupled with the state of the country and of the public mind when the publication took place, for these may be most material in considering the offence. For example, if the country was free from political excitement and disaffection, was engaged in the peaceful pursuits of commerce and industry, the publication of such articles as have been extracted from American papers might be free from danger and comparatively innocent; but in a time of political trouble and commotion, when the country has just emerged from an attempt at armed insurrection, and whilst it is still suffering from the machinations and overrun by the emissaries of a treasonable conspiracy, hatched and operating in a foreign land, the systematic publication of articles advocating the views and objects of that conspiracy seems to admit but of one interpretation. The intentions of men are inferences of reason from their actions where the action can flow but from one motive, and be the reasonable result of but one intention. Now I would invite you to a careful examination of these articles. You should deal with them in a broad and candid and liberal spirit, and subject them to no narrow and jealous criticism. In considering them, you should recollect that there is no sedition in censuring the servants of the Crown or in just criticism on the administration of the law, or in seeking redress of grievances or in the fair discussion of all party questions. You should remember that you are the guardians of the liberty and freedom of the press, and that it is your duty to put an innocent interpretation on these publications if you can. But if on the other hand, from their whole scope, you are coerced to the conclusion that their object and tendency is to foment discontent and disaffection, to excite to tumult and insurrection, to promote the objects of a treasonable conspiracy, to bring the administration

of justice into disrepute, or to stir up the people to hatred of the laws and the constitution, then you may, if you think fit, and you ought to find the bills, and send the case to be tried by a petit jury. There is another case of equal gravity and equal importance upon which I will say very little, as the observations I have made upon Mr. Pigott's case would be applicable to it also—that is the case against Mr. Sullivan, the proprietor and publisher of a paper called the *Weekly News*. It is different in this respect, that the articles complained of all relate to the Manchester executions. They are, with one exception, original articles. One of them is as follows :—

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“LIBERTY!—GOD SAVE IRELAND.—Brothers and friends of Irish liberty, do not despond. The persecutions of centuries will soon be avenged; and, by the force of our arms, we will purge our native soil from the curse of British misrule. What has been our position hitherto? We labour hard and constantly, not to enjoy the fruits of our industry, but to support the revelries of landlords, forced upon our fathers by the English despoilers of our country. Then Ireland expects that every man will do his duty when the time of the glorious struggle arrives. Be united, and remember the cause for which Allen, O'Brien, and Larkin died on an English scaffold!”

In the case against Mr. Sullivan the Attorney-General put forward some counts of a very peculiar character. He alleged that several woodcuts published in the *Weekly News* were seditious libels; and as I have never seen these documents, and cannot well understand them from the description in the informations, I cannot be expected to say anything upon them. However, you will see them, and I only glance at the subject for the purpose of telling you that a seditious libel does not necessarily consist of written matter, and it may be evidenced by a woodcut or engraving of any kind. In conclusion, I need only say that I am convinced you will fairly and carefully examine these important cases, doing your duty with calmness and temperance, and showing a bright example in the fair and candid administration of justice.

The grand jury then retired, and shortly after brought in true bills in both cases.

February 14, 1868.

REG. v. ALEXANDER MARTIN SULLIVAN.

In this case, true bills having been found by the grand jury, the prosecution was conducted on the part of the Crown by *Warren*, Q.C. (Attorney-General), *Harrison*, Q.C. (Solicitor-General), and *Shaw*, Q.C.

*Heron*, Q.C., and *Molloy* appeared for the defendant.

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FITZGERALD, J. (at the close of the case) charged the jury as follows: I regret to be obliged to detain you by observations more in detail than I could wish, and I feel called upon to do so, not alone on account of the gravity of the occasion, or the wide scope the arguments have taken, but from the peculiar and difficult nature of the question you will have to determine. I am not less called upon to adopt that course from the recollection that you are here in this trial the sole judges of the law and the facts. My duty is to simplify the case you have to determine, assist you if I can, and address you solely in the calm voice of reason. This is a prosecution of a very unusual nature. There has not been one of this character certainly for the last twenty years. The jury are constituted by law the sole judges to determine every question between the Queen and the defendant. I would remind you in the outset that there will be four questions for you to apply your attention to. The first is a question of fact—Did the defendant publish the libels? Upon that there will be no difficulty, for it is not a matter of controversy that Mr. Sullivan, the defendant, is the proprietor and publisher of the *Weekly News*, and that the several articles and woodcuts were published in that paper. The next question for you to examine into is this—Do these publications, whether printed matter or woodcuts, fairly bear the interpretation which the Crown has put upon them by the innuendos? The next question is one of paramount importance, and it is the one of which the jury are the sole judges, whether these publications are seditious libels? That question of law and fact is entrusted to the jury alone. I know that some of you have considerable experience as jurors, and I have often had the duty cast upon me of addressing you as such. You must have observed that in ordinary cases, especially in the Crown Courts, the questions were divided into those of law and fact. The questions of law are usually for the judge, and on them the jury are bound to take his direction. The questions of fact are solely for their determination. In this peculiar case of libel the law of the land says that the jury shall determine the whole question, whether the publication is a libel or a seditious libel. That power has been given to the jury for the purpose of protecting the inviolable blessing of a free and independent press. You should bear in mind that, while you will receive assistance from me, you are not bound to follow anything I tell you. You are the sole judges of law and fact. There are some questions upon which I shall have to give you assistance in point of law, namely, whether the publications in question were published by the defendant with the intention alleged in the indictment. If you come to the conclusion that the defendant published those articles, that the true meaning has been given to them, that they are seditious libels published with the intention imputed to them, you have all the elements which would warrant you in bringing in a verdict of guilty. Before going into detail I would remind you that the defendant is prosecuted as the proprietor of a public

journal. There is in this country perfect freedom of the press, and to many of the passages in these publications about the down-trodden condition of the country the present answer is that there exists a free press, and where that exists liberty must co-exist with it. When you come to consider what a journalist may do, I have to point out that a journalist may (and indeed it is his duty) canvass and censure the acts of the Government of the State. He is free to discuss their acts and their public policy, and he may canvass and, if he thinks proper, censure the acts of Government and Ministers, and, above all, he is invited to consider what is of the greatest importance—the administration of the law; for it has been well said by Mr. Burke and a great American writer, that, “after all, what are all our institutions for, what do we go to war for; for what do we make peace; which is the final object and end? It is that the administration of justice shall be pure and uncorrupted;” it is that we may have an institution such as I see before me, a jury of the country to decide upon the civil rights and responsibilities of the people. It is with that view that the public press is invited to consider the proceedings of courts of justice, for, like every other human tribunal, courts of justice are fallible and liable to err. Justice demands that the errors of courts of justice shall be pointed out, and all this is within the province of a public journal. But this course should be carried out with calm and temperate language. The man who criticises the conduct of the Government ought not to impute improper motives, and though he may point out that there is bad administration of justice, yet he should not use language that would indicate contempt of the laws of the land. With these preliminary observations you will proceed with me to consider this matter, remembering that when a public writer exceeds his limit and uses his privilege to create discontent and dissatisfaction he becomes guilty of what the law calls sedition. Now, I would invite your attention to the indictment. There are three allegations. It is alleged that the defendant intended by these publications and prints to excite hatred or contempt of Her Majesty’s Government and the administration of the laws; and further, that these prints were intended to create dissatisfaction, to excite hatred and contempt of the Government, and to disturb the tranquillity of the realm. Without defining sedition further than for the purposes of this trial, I have to tell you if you, in your honest judgment, come to the conclusion that these publications, or any of them, are calculated and intended to excite hatred of the Government and the administration of the laws, or create dissatisfaction, or disturb the public peace, then they are seditious libels. I do not think I can put the matter plainer than that. If the publications are calculated and intended to carry out these intentions they are seditious libels. In the sixth count of the indictment the publication of seditious pictures is alleged, in which Her Majesty’s Government is represented as a woman holding Erin, meaning the people of Ireland, in bondage. In

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reference to these pictures you will see for yourselves whether they bear the description given of them. The heading of the picture is, "England and Austria: a Striking Contrast." It was open to the Attorney-General to call intelligent witnesses, and ask them what the true meaning of this picture was; for, after all, the question is not how Mr. Sullivan meant it, but how it would be understood by an ordinary intelligent individual. If you could derive any aid from oral testimony, it would be from that supplied by Mr. Denis Sullivan, who stated that the picture was intended to point out, as a matter of policy, the effect that might be produced in this country if England would adopt the system of conciliation adopted by Austria to Hungary. You know that Austria has conferred upon Hungary a free and independent government. The picture also represents Ireland forcibly bound and trampled upon by England. That refers to the deprivation of a portion of Ireland's liberty by the Habeas Corpus Suspension Act. It will be for you to take into account the letterpress that accompanies this, in order to assign the true meaning to it; but there is not much difference between the meaning assigned to it by the Crown and that assigned by the defendant. It is one of those means of deliberate and gigantic deception by which the people of this country are periodically misled. I call it deliberate and gigantic deception, because they were dealing with an acute race—with a people amongst whom education is every day spreading further and further—a people who, if only allowed to know the truth and to form judgments for themselves, are quick-witted and able to form judgments upon what is their true and real interest. But we cannot shut our ears to this, that for many years, as well as during the present time, the people were not allowed to know the truth. Can any one say that this picture really and truly represents the state of the Irish nation when it represents Hibernia cast upon the ground, held down by the violent hand of England? I will now pass for a moment to the Habeas Corpus Suspension Act. Why was it enacted? Why, with the consent of all that was good in the nation, who gave up for a short time the name of liberty in order that the hands of the Government might be strengthened to protect the interests of the country from the hands of foreign marauders and incendiaries. Is there a country in Europe that enjoyed more real freedom than Ireland notwithstanding the suspension of the Habeas Corpus Act? You are free to write, free to speak; you have an unshackled press; you are to believe according to liberty of conscience; and this country, in point of rational liberty, bears comparison with any country on the globe. I am not now dealing with past events or past misgovernments, which undoubtedly did exist, and the penalties of which we are now suffering. I am dealing only with the present state of things, and I say that, on the 22nd of June, 1867, save for the voluntary surrender of a portion of its liberty to save its institutions, Ireland, in point of liberty, challenged comparison with any country in the world. To

say otherwise is not true, but is part of a gigantic system of deception, practised year after year, which prevents the people knowing the truth and misleads the people into what is contrary to their good. I may refer, on the contrary, to the topic of Fenianism. The Fenians in Ireland are bent on deceiving the Fenians in America, and the Fenians in America deceive the Fenians in Ireland. Do you think Fenianism would be in its present state if the Fenians in America and the Fenians in Ireland knew how much they are despised and distrusted in each country? No; but the real truth is not allowed to be known. However, you will put on the print the interpretation you think fit. It is open to you to adopt, if you can, the interpretation which Mr. Denis Sullivan put on it, that it was not intended to promote discontent and disaffection, but only to point out to the English Government what would be the fruits of a policy of reconciliation, as it was called, between England and Ireland, by giving, as Austria did to Hungary, an independent Government. If that is the true meaning, your verdict as to that picture should be given to the defendant. The next picture is headed, "It is done." The Crown charges this to be a scandalous and malicious libel, representing Her Majesty's Government under the form of a woman with a raised dagger, and appearing to have recently slain some persons and as trampling a balance and scales, intended to represent Justice. Before you can convict the defendant for that you should be satisfied, beyond a reasonable doubt, that such is the true meaning of the picture. And again I have to remind you that no witness was called on the part of the Crown to give oral evidence of the meaning of the picture. In reference to the meaning, you can consult the letterpress accompanying the picture, which defendant's counsel contended indicated as the true meaning of the picture what Mr. Denis Sullivan represented. If the picture means what the Crown imputes there is no doubt it is a wicked and malignantly seditious libel. The female figure is the matter in dispute, and Mr. Denis Sullivan, in reply to the case for the Crown, said the figure was intended to represent, not the Government, but that portion of the British people which, it was alleged, grossly misconducted themselves at the Manchester executions. You all know from reading the public papers that unfortunately it is the practice of the lowest of the low, in London and elsewhere, to spend the night before executions in drinking, and otherwise misconducting themselves, which is one of the reasons why the abolition of capital punishment, at least in public, is advocated, and Mr. D. Sullivan alleged that the night before the Manchester executions the crowd was drinking and engaged in "orgies." Whether that is true or not I do not know, nor is it important to inquire. The figure is somewhat different from the one in the first picture, which has not the same malignant expression; and Mr. Sullivan stated that this figure represented the section of the British public who misconducted themselves at Manchester, and at Birmingham and Windsor, when means were being taken to

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have the prerogative of mercy extended towards the condemned convicts. The jury are bound to give every weight to the statements of Mr. D. Sullivan, who is in this respect wholly uncontradicted, as no witness was produced to give a different view of it; but still the question was not what Mr. Sullivan intended the picture should be, but what meaning a person of ordinary intelligence would be likely to put upon it. The remaining woodcut, "The Angel of Justice," is said to be a wicked libel, as representing Her Majesty's Government in the form of a woman holding a dagger in her hand, with which she has committed a guilty deed in the execution of the three men whose bodies lie on the ground, and is flying from the scene of her crime, pursued by the Angel of Justice. You have to consider, in reference to the meaning of the picture, the evidence of Mr. Denis Sullivan. The Crown gave no evidence. Without any evidence at all my opinion is rather that as to that picture the verdict should be for the defendant, because, without oral testimony, you cannot venture to put a meaning on it. The woodcut is after a painting by David, of Cain flying from the body of his brother Abel. The Crown said the female figure pursued by the angel was intended to represent Her Majesty's Government. Mr. Sullivan said it was a representation of the section of the British public who misconducted themselves in the manner he mentioned, and you will say, looking at the picture, what meaning is to be put on it. I now come to the articles. The first I will allude to is that headed "Liberty!—God save Ireland." I dealt with that in my charge to the grand jury as an original article, because it was put in the indictment without any explanation. That article, as the defendant's counsel declared, if published with the intent assigned by the Attorney-General, is an overt act of high treason. It commences—"Brothers and friends of Irish liberty, the persecutions of centuries will soon be avenged; and, by the force of our arms, we will purge our native soil from the curse of British misrule," and it expresses a hope that every man would do his duty when the time of struggle arrived. But the circumstances attending the publication of that article now wear, I am happy to say, a very different appearance. It is proved to have been sent from a correspondent in Knockcroghery, who stated that it was published on the walls of a national school. No doubt, as I told the grand jury, the law does not protect the publication of treasonable matter merely because it is not original, but I do not agree with the Attorney-General, who said it was wholly immaterial whether the article was original or not. I cannot go to that extent, because if an article was not original, it might be a very important element in considering the interpretation to be put on it what was the intention in publishing it. I concur with the counsel for the defendant that, if the law of libel was carried out in the full strictness of its letter, it would materially interfere with the freedom of the press. Hence a great deal depends upon the forbearance of Government, the discretion of judges, and, above

all, on the protection of juries. For instance, it is open to the community and to the press to complain of a grievance. Well, the mere assertion of a grievance tends to create a discontent, which, in a sense, may be said to be seditious. But no jury, if a real grievance was put forward, and its redress *bonâ fide* sought, although the language used might be objected to—no jury would find that to be a seditious libel. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. How closely that trenches on the law of sedition; and yet such writing, when *bonâ fide*, would receive protection from a jury. Therefore, you are at liberty to look to the surrounding circumstances, and probably if you look to the papers of the day besides the *Weekly News*, you will find that Fenian placard published as a matter of news. It would be better that the document should not be published. It is a document of which the proprietor or publisher of a paper might say that he forebore to print it as it was of an objectionable character. However, it happens that in laying before the public a true statement of the events of the day, matters of a very objectionable character are published. It is a very objectionable document, and the question is did Mr. Sullivan in publishing it intend to cause Her Majesty's subjects in Ireland to oppose and overthrow her power and authority? I have heard in this case the Solicitor-General candidly avow that he did not impute to Mr. Sullivan that he belonged to the Fenian conspiracy; but you are asked to come to the conclusion that he published that paper, Fenian in its character, with the intention of furthering the objects of that conspiracy, namely, the overthrow of Her Majesty's Government. The remaining counts relate to articles concerning the executions at Manchester. As the Attorney-General has not alluded to any other articles in the *Weekly News*, it should be assumed that no other articles appeared which would support the prosecution. Therefore, you must consider the articles themselves, and them alone. You should assume, for the purposes of the trial, that the conviction of Allen, Larkin, and Gould was legal and proper. The defendant had a right to discuss fairly and *bonâ fide* the administration of justice as evidenced at this trial. It is open to him to show that error was committed on the part of the judge or jury, nay, further, for myself I will say, that the judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed. Yet, whilst they invite the freest discussion, it is not open to a journalist to impute corruption. It is also quite open to the defendant to discuss the executions as a political blunder, for that is a subject upon which public opinion is very much divided. Those who are entirely opposed to capital punishment think there should be no executions. Others look upon the matter as a political offence, and think that the sentence should be only penal servitude for life; whilst another portion of the community think that public safety required that justice should

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take its course. If the article had simply been a free discussion of these questions, or of the acts of the Government, this prosecution would never have taken place. But the Attorney-General says that the bounds of criticism have been passed. There may have been mistake and error in the conviction of these men in Manchester, there may have been bad policy in carrying out to the fullest extent the sentence of the law against all these men but one. The defendant has been represented, and truly, as one who upon the occasion of constable Kenna's death in Dublin took an active and praiseworthy part in voting a sum of the public money, and in subscribing himself towards the relief of the family of the murdered man. That conduct is worthy of the highest approval, but you should see what distinction there was between the act which he condemned by his vote in the corporation, and the act which he praised to some extent by the article in his newspaper. The comparison is altogether in favour of the Dublin assassin. The men at Manchester went voluntarily to rescue two persons, and they were armed so as to overbear all opposition at the expense of life. For that act there is no palliation. In the case of the Dublin assassin it may be hoped that there was to some extent self-defence in his action. Whatever distinction there is is in favour of the Dublin assassin, and not of the crime committed in Manchester. I could have wished that the Government could have seen their way to mitigate the sentence against at least two of those who were concerned in the Manchester murder, but I cannot shut my eyes to the fact that between the sentence and execution of these men in Manchester there intervened the assassination in Dublin, which could not but have had a great effect in shutting the door of mercy to the Manchester men. The next article relates to the funeral processions, and it states that the trials at Manchester were little better than a mockery. The statements in it remind me of an expression attributed to a great bishop of the Catholic Church, a man of great enlightenment, the Bishop of Kerry. That prelate said if they were no murderers, but brave-spirited patriots who had done an act not to be condemned, but to be praised, all persons ought to follow their example. You are to consider not isolated passages, but the whole of the articles complained of; and once more, I repeat, you and you alone are to judge whether they were libels or not. One question only remains—if you come to the conclusion that the defendant published the matters complained of—and that they are seditious libels, then you should consider whether they were published with the intent alleged by the Crown. To constitute crime, the criminal intent and the criminal act should concur. But every person must *primâ facie* be taken to intend the natural consequences of his own acts. You cannot dive into the intentions of a man's heart, save so far as they are indicated by his acts and their natural consequences. This rule may at times operate harshly, but public policy requires that it should be put in force. I recollect an instance of this—which

does not apply at all to the present case—where a man convicted of treason felony evidenced by writing, made a plea for commiseration that he was wrongfully convicted—that he had not the intent—that he was a mere writer for money. It failed, however; the man had to be held responsible for the natural consequences of his acts. Again, if a newspaper writer entirely opposed to Fenianism, yet writing to take the wind out of the sail of another paper for the purpose of promoting the circulation of his paper, libelled the Court, he could not be listened to on such a line of argument disavowing his responsibility. In considering the intent with which the publications now before them were made, you will regard all the surrounding circumstances—the state of the country—the state of public opinion—and then in your honest judgments say did Mr. Sullivan publish the articles and prints with the intent imputed by the Crown. In discussing that question you ought to remember that the four articles in question were the only articles that the Attorney-General could lay his hands upon as calculated and intended to carry out the object imputed. With these observations I leave the case in your hands. I invite you to deal with the case, which is a grave and important case, in a fair, free, and liberal spirit. In dealing with the articles you should not pause upon an objectionable sentence here, or a strong word there. It is not mere strong language, such as “desecrated court of justice,” or tall language, or turgid language that should influence you. You should, I repeat, deal with the articles in a free, fair, and liberal spirit. You should recollect that to public political articles great latitude is given. Dealing as they do with the public affairs of the day—such articles if written in a fair spirit, and *bonâ fide*, often result in the production of great public good. Therefore I advise and recommend you to deal with these publications in a spirit of freedom, and not to view them with an eye of narrow criticism. Again, I say you should not look merely to a strong word or a strong phrase, but to the whole article, and so regarding each article you should recollect that you are the guardians of the liberty of the press, and that, whilst you will check its abuse, you will preserve its freedom. You will recollect how valuable a blessing the liberty of the press is to all of us, and sure I am that that liberty will meet no injury—suffer no diminution at your hands. Viewing the whole case in a free, bold, manly and generous spirit towards the defendant, if you come to the conclusion that the publications indicted either are not seditious libels, or were not published in the sense imputed to them, you are bound, and I ask you in the name of free discussion, to find a verdict for the defendant. I need not remind you of the worn-out topic—to extend to the defendant the benefit of the doubt. I ask you again to view the publications in a broad and bold spirit, and give them a liberal interpretation. If, on the other hand, on the whole spirit and import of these articles you are obliged to come to the conclusion that they are seditious libels, and that their necessary consequences are to excite contempt

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of Her Majesty's Government, or to bring the administration of the law into contempt and impair its functions—if you come to that conclusion, either as to the articles or prints, or any of them, then it becomes your duty honestly and fearlessly to find a verdict of conviction upon such counts as you believe are proved. I need scarcely remind you of the oaths you have taken to make true deliverance, without fear or favour, between the Crown and the accused, and I am certain that to the utmost you will strive to do that duty, and find a verdict according to truth, right, and justice.

*Guilty.*

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*February 20, 1868.*

REG. v. RICHARD PIGOTT.

In this case the prosecution was conducted by the same counsel as in the preceding case.

*Heron*, Q.C., and *Perry* appeared for the defendant.

DEASY, B. (at the close of the case) charged the jury. He said: Without expressing any opinion as to what the verdict should be, I do not wonder that the Attorney-General has brought these publications under the notice of a jury for the purpose of asking their opinion as to their legality. No one can complain in the slightest degree of the manner in which the law officers have conducted these prosecutions. In this country public journalists enjoy very extensive privileges, and have very extensive rights. They are entitled to criticise the conduct and intentions of those entrusted with the administration of the Government. They are entitled to canvass, and, if necessary, censure, either the acts or the proceedings of Parliament; and entitled to point out any grievances under which they may consider the people labour. The jury are the sole judges of the law and the facts of this case, and have a sole right to pronounce a verdict upon the guilt or innocence of the prisoner. I have not the slightest wish or intention in any way to infringe upon the right which the law has given you, or to relieve you of any of the responsibility involved in the case. I have told you the limits within which public journalists may exercise their talents. But I will now tell you also that a public journalist must respect the existence of the form of Government under which he exercises those very extensive rights and privileges to which I have referred. He must not either covertly or openly devote the pages of his journal towards the overthrow of the Government. He must not when a treasonable conspiracy exists in this land make his journal ancillary to the treasonable purposes of that conspiracy, or supply the members of it with intelligence, or devote his journal to encourage them to persevere in that conspiracy, or to encourage others who may not be embarked in it to become



involved in its meshes. He must not spread discontent in the land or inflame the minds of the people, so that they may be more ready to join in the insurrection which conspirators are seeking to bring about. It is alleged in the indictment that the defendant has in various articles done all this. He has pleaded not guilty to that, and you are to try whether he is in any way guilty of having done so. You all know the powerful effect that newspapers have had in the overthrow of Governments, and Governments have a right to protect themselves from attempts to overthrow them, and it is the duty of loyal people to aid them in that purpose. In this country the only power the Government possesses is that of bringing a newspaper writer before a jury. I trust that the necessity for strong measures will never arrive. Jurors have too much interest in the freedom of the press to sanction any encroachment upon that freedom, and they ought to give the greatest latitude to any writing brought before them. It would be better that a journalist should escape from the consequences of his acts than that a writer should write under a dread of punishment. Therefore you should make every allowance for freedom of discussion, make every allowance for excitement and passion; and if, after making all these allowances, you think that the limits of fair discussion have been overstepped, and that the defendant has devoted his newspaper to these purposes or any of them, and with the intention ascribed to him in the indictment, it will be your duty, great as your regard may be for the liberty of the press, to pronounce a verdict upon such of the counts as you think are sustained by the publications to which I will now direct attention. The articles are numerous, and it will be your duty to read each and every one of them, and consider their tendency, construction and effect, and pronounce a verdict upon each and every one. The articles consist of various classes. There are five publications which are reprints from American newspapers, and three of them are leading articles. Two of them are resolutions of Fenian circles published in the papers of the 13th of July and 19th of October, and admitted to have been copied from American newspapers. As to that class of publication there is this observation to be made. The mere fact that they are copied from other newspapers does not exempt the defendant from liability. If they are libels on individuals it is no justification to say they are copied from other papers. They may have been copied through carelessness or ignorance, but that will be a matter of consideration for you. One of these articles describes the wanderings of a person who signs himself Harvey Birch. The writer gives a very exaggerated account of the state of the country before the abortive rising. I had occasion to read, for the purposes of this trial, a great deal of Fenian literature, and it certainly is characterised by great exaggeration as to the state of affairs in this country. One thing that struck me was, that the sense of the alleged oppression seems to grow more acute as the distance from this country increases. The people here do not

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seem to entertain so acute a sense of the alleged oppression as those in America. The Attorney-General very properly relied upon other articles as evidencing the intention of the defendant in publishing the articles complained of. They are properly admissible for that purpose, and ought to be viewed by you as throwing light upon the intentions of the defendant in printing and publishing the articles complained of. The defendant seems to have been very successful in gleaning from the American newspapers a large quantity of Fenian articles and Fenian information. The next article is entitled "Ireland's Opportunity." It is a directly treasonable article. It speaks of sending an expedition to Ireland for the purpose of making war upon the Government. It is for the jury to consider whether the article was published with the intentions alleged, taking into account the company in which it is found. The next article consists of suggestions for the future management of Fenian affairs in Ireland. That that is treasonable there is no doubt. It is said that the defendant published these articles with the view of keeping pace with other newspapers. Of course you should give due weight to that. The next articles consist of resolutions of Fenian circles, and they are taken from the *Boston Pilot*; these are also treasonable. That disposes of the second-hand publications. Then there is a letter which appeared in the defendant's paper of the 19th of October. It is introduced by a statement that the editor does not agree with all that was said by his correspondent. The letter gives an enthusiastic account of Fenian doings in America, money being showered in by hundreds of thousands to the Fenian exchequer, and regiments of cavalry and infantry being enrolled for the Fenian cause. It is for you to say whether that letter is calculated to excite disaffection in this country. There are also the letters of Colonel Kelly, which contain the most serious threats against the Government of England. I believe that letters like these must have had a very injurious effect with reference to the three unfortunate men who were executed at Manchester. The crime for which those men were executed was in the eye of the law murder, but there were differences of opinion, then and now, both in England and in Ireland as to the advisability of executing those men, having regard to the circumstances connected with the crime of which they were found guilty. You should make allowance for fair commentary in the public press in reference to the trial of those men and their execution, but that fair commentary does not admit of seditious articles against the Government, and such as are calculated to excite hatred and contempt of the laws. The article called "The Holocaust" is of a highly inflammatory character in reference to the whole conduct of the Government. It is calculated to lead the people of this country to believe that those men had been unfairly dealt with. You have to say what is the tendency and effect of the articles charged in the indictment. The next class of publications to which I will refer consists of the



advertisements, including the advertisement "'98, '48, '68," and the article in reference to the attack on Kagosima. In reference to the advertisement about the procession, it should be considered whether it is calculated to bring the Government into contempt. In another article a parallel is drawn between an attack upon Japan and the explosion at Clerkenwell. The latter was as terrible a crime as ever took place in Europe, and the object of the article is to show that Her Majesty's Government committed a greater crime in Japan than was committed at Clerkenwell. You should consider whether that was published with a criminal intent. The last article is Mr. Vaughan's letter. Part of it consists of abuse to which no criminality can be attached. It spoke of Catholic Whigs, and perhaps in this epithet it includes myself, my learned colleague, and perhaps also Mr. Heron. But other portions of it are not of such an innocent character; and the question is, did the defendant publish it for the purpose of exciting to disaffection? Three articles of a contrary tendency are relied on by the counsel for the defendant. One of these refers to the case of Orr, and it recommends leniency on the part of the Government towards the Manchester men. That is a very fair article, and it will be for you to say how far it negatives the charges put forward by the Attorney-General. It is relied upon for the defendant that these articles from the American papers were published as news for the purposes of encouraging the publication of the paper. That is a very fair matter for the consideration of the jury. It should also be borne in mind that in an article published some time ago the defendant denied that his paper was a Fenian paper, and stated that it had been called so by persons with oblique minds, who would rather the Irishman had joined in the howl against the Fenians. Whatever verdict you may give will be, I feel sure, satisfactory and conscientious to the Crown, the public, the court, and the defendant.

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RICHARD  
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*Seditious libel.*

*Guilty.*

Attorney for the prosecution, *The Crown Solicitor.*

Attorney for Alexander Martin Sullivan, *J. Scallan.*

Attorney for Richard Pigott, *F. Hamilton.*

## Ireland.

## NORTH-EAST CIRCUIT.

DUNDALK SPRING ASSIZES, 1868.

February 20.

(Before Mr. Justice BATTERSBY.)

REG. v. NUGENT.(a)

*Escape—Habeas Corpus Act—Warrant—Arrest—Practice.*

A warrant issued by the Lords Justices General of Ireland, under "The Habeas Corpus Suspension Act (Ireland), 1866," is good, although signed by one only of the three Lords Justices; as the exception in the Queen's patent, empowering "one or two of them, in the absence of the other or others of them, occasioned by sickness or any other necessary cause, full power and authority to act, perform, and do all and every act, matter, or thing to the said office appertaining," is sufficient to satisfy the provisions of the act requiring signature by the chief governor or governors of Ireland for the time being.

The fact that the warrant is signed by only one of the Lords Justices is sufficient to raise a presumption that the necessity provided for by the exception in the patent has actually arisen.

The prisoner was asked by a policeman to come into his (the prisoner's) own parlour and there told that the sub-inspector wanted to see him. He asked what he wanted, and was told that he would hear from himself. No mention was made of a warrant being out, but the prisoner said, "May I consider myself under arrest?" and the constable said, "You may." The sub-inspector came in afterwards and produced a paper, which he told the prisoner was a warrant. The prisoner made no submission, but immediately leaped out of the window:

Held, that this proved an arrest and escape.

A warrant of this kind is criminal process, so as to make an escape from custody under it an indictable offence.

THE prisoner was indicted for that he being lawfully in custody under a warrant of the Lords Justices of Ireland unlawfully did escape out of the said custody.

(a) Reported by W. MULHOLLAND, Esq, Barrister-at-Law.

The warrant was issued under the 29 Vict. c. 1 (Habeas Corpus Suspension (Ireland) Act), s. 2, which provides as follows: "In cases where any person or persons have been, before the passing of this act, or shall be during the time this act shall continue in force, arrested, committed, or detained in custody by force of a warrant or warrants of Her Majesty's Privy Council of Ireland, signed by six of the said Privy Council, for high treason, or treason felony, or treasonable practices, or suspicion of high treason or treason felony, or treasonable practices, or by warrant or warrants, signed by the Lord Lieutenant, or other chief governor or governors of Ireland, for the time being, or his or their chief secretary, for such causes as aforesaid, it shall or may be lawful for any person or persons, to whom such warrants have been or shall be directed, to detain such persons so arrested or committed in his or their custody," &c.

*Pigot and R. W. McDonnell*, for the Crown, put in evidence the Queen's patent, appointing Richard Chevenix Trench (Lord Archbishop of Dublin), Mazière Brady (Lord Chancellor of Ireland), Sir Hugh Rose (Commander of the Forces in Ireland), Lords Justices of Ireland in the temporary absence of the Lord Lieutenant, in April, 1866.

During this time the warrant was issued.

The warrant under which the arrest was made was then tendered. It was as follows:—

*"By the Lords Justices General and General Governors of Ireland.*

"Whereas information has been received that John Nugent, of the county and town of Drogheda, is suspected of being concerned in treasonable practices, these are therefore in Her Majesty's name to command you Robert Gardiner, sub-inspector of constabulary, Drogheda, to search for and apprehend the body of the said John Nugent, and him, the said John Nugent, when apprehended, safely to convey and deliver into the custody of the governor of the gaol of the city or place where he shall be arrested; and we command you, the governor of the said gaol, to receive the body of the said John Nugent into your safe custody in the said gaol, and him, the said John Nugent, there safely to keep until discharged by due course of law, and for so doing this shall be your sufficient warrant.

"Given under our hand and seal the 11th of May, 1866.

"MAZIERE BRADY, C.

(Seal.)

"To Robert Gardiner, sub-inspector of constabulary, Drogheda, and his assistants, and all sub-inspectors, heads, or constables, or any of them, these to execute, and to the governors of Her Majesty's gaols in Ireland."

*Falkiner, Q.C.*, for the prisoner, objected to the reception of the warrant, on the ground that it was not signed in conformity with

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the provisions of the act, as upon the construction of the words “chief governor or governors” in the 2nd section, the warrant should be signed by the person or all the persons in whom the government of Ireland was for the time vested; that the patent showed that there were three governors at the time of the issuing of the warrant, while the warrant was only signed by one.

*Pigot, contra*, called attention to the following provision in the patent: “And our further royal will and pleasure is, that the said Richard Chevenix Trench, Mazière Brady, and Hugh Rose, whom we have hereby constituted our Justices General or General Governors of Ireland as aforesaid, shall, and we do hereby give and grant unto them, or one or two of them, in the absence of the other or others of them, occasioned by sickness or any other necessary cause, full power and authority to act, perform, and do all and every act, matter, or thing to the said office of our Justices General and General Governors of Ireland aforesaid belonging or appertaining, or which shall be fit, requisite, and necessary by him or them to be performed and done in that behalf.” He contended that this substituted one or two of the governors for the original three in case of necessity, and that upon the principle *omnia præsumuntur ritè et solenniter esse acta*, it must be presumed that the necessity pointed at by the patent had arisen, and that the signature of Mazière Brady was made under such circumstances as would make his sole signature sufficient.

*Falkiner, Q.C., and Hamill, contra.*—The Court will construe this act of Parliament, which is penal, and in diminution of the liberty of the subject, as strictly as possible. The warrant now produced is clearly not signed in conformity with the act of Parliament. The words “other chief governor or governors” are to be read separately. Their meaning is that the warrant must be signed by the person or persons, whether one or many, then representing the Government. If the government be vested in one person, as is ordinarily the case, he must sign; if it be vested in several all must sign. That being so, the Court will take judicial notice that three persons represented the Government at the time this warrant was issued; indeed at present the Crown have given evidence of that by the production of the patent vesting the government in them. The Court cannot go beyond this. No exception can vest the government in one, which has already vested in three. But what is this exception? It does not profess to transfer the government from the original three to one or two upon illness or other case of necessity, but merely empowers a minority to do ministerial acts for the others in as binding a way as if done by themselves. In fact, it gives to one or two a power of attorney to act in case of necessity; it provides one hand to act for all in order that the work of government may go on. But this does not make the substituted person “chief governor” of Ireland; and nothing less will satisfy the statute. The principle *omnia præsumuntur ritè et solenniter esse acta* brings us no further than a presumption that this is a warrant signed by

*Mazière Brady.* Even if this exception is all that is contended for, evidence should be given that, on the day of the date of this warrant, the other two Lords Justices were ill or unavoidably absent so as to create the necessity pointed at.

*BATTERSBY, J.*—I go with the argument of the prisoner's counsel to the extent that the true construction of the act requires the warrant to be signed by the "governor or governors" of Ireland, whether one or many, for the time being. But, on looking at the patent, I find an express exception, substituting one or more for the three in case of necessity. Whenever such necessity arises I think the substitution of one or two for the original three is complete; complete enough even to satisfy this statute, which I admit must not be construed strictly. That being so, we must presume that the necessity has arisen in this case, and it is not necessary to give affirmative proof of that.

His Lordship stated, however, that he would reserve the point for the Court for Crown Cases Reserved.

Evidence was then given that two policemen had gone up to the prisoner's house, and had met him in the yard, and asked him to come into the parlour. On going in, they said the sub-inspector of police wanted to see him. The prisoner asked what he wanted. They said he would tell him himself when he came. He asked, "Am I to consider myself under arrest?" They said he might. They did not, however, tell him there was a warrant for his arrest. One of the policemen then went away, and the other remained in the room with the prisoner. The prisoner asked if he might go into the next room for his dinner. The policeman said "No," but that he might have his dinner brought in there. Shortly after, Sub-Inspector Gardiner came in. He held the warrant in his hand, and said to the prisoner that this was a warrant for his arrest. He did not read it, nor touch the prisoner. The prisoner said, "Is my name in it?" and came forward, as though to look at the warrant, turned the key in the door, and leaped out of the window. He was not arrested till nearly one year and a-half afterwards.

Sub-Inspector Gardiner admitted, on cross-examination, that the movements of the prisoner and his conversation were not of a nature to imply submission to the warrant, but merely a desire to gain time.

*Falkiner, Q.C.*, for the prisoner, submitted that there was no evidence of an arrest. The policeman had made no arrest in the first instance. The prisoner had merely waited for the visit of the sub-inspector at their request. Even if the prisoner was under compulsion, it was not a legal arrest, as the police had not a warrant, nor did they communicate its existence to the prisoner. On the arrival of the warrant there was no arrest, actual or constructive. After Gardiner's arrival, the prisoner was never put under compulsion, nor made any submission.

His Lordship ruled that the arrest was perfect. The arrest by the policeman was good, subject to the production of the warrant

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afterwards. On the arrival of Gardiner with the warrant the arrest was complete.

*Falkiner*, Q.C., then objected that this warrant is not criminal process, and therefore there was no offence. It is nothing more than a process for detention during the Queen's pleasure. It is no offence at common law to escape from custody, unless the custody be of criminal process. The warrant is issued at the discretion of the Lord Lieutenant in Council, and implies no offence committed or suspected to have been committed. It is merely process for safe keeping.

His Lordship, however, overruled this objection also, and sent the case to the jury, but reserved the consideration of the entire case for the Court above.

*Convicted.*

Attorney for the prosecution, *J. H. Parkinson*.

Attorneys for the prisoner, *J. Lawless* and *T. Rowland*.

[NOTE.—This case was never reserved for the Court above, as the term of imprisonment had expired before there was a possibility of the sitting of the Court.—  
REPORTER.]

## Ireland.

## COURT OF CRIMINAL APPEAL.

June 3 and 7, 1866.

(Before LEFROY, C.J., MONAHAN, C.J.; O'BRIEN, KEOGH, FITZGERALD, and O'HAGAN, JJ.; FITZGERALD, HUGHES, and DEASY, BB.)

REG. v. GILLIS.(a)

*Admissibility of confession obtained in expectation of being received as Queen's evidence, upon subsequent refusal to prosecute.*

*The prisoner had volunteered a statement implicating himself and others in the Fenian conspiracy to a constable who came to his house to search for arms. The constable asked the prisoner, "Had he any objection to tell that to the superintendent?" The prisoner said he had not; whereupon he went with the constable to the superintendent, and thence to a magistrate, where he made an information on oath to the same effect. The prisoner was not cautioned in the usual way, but no inducement was offered to him to make the information. A few days subsequently he was asked to come and hear the information read in the presence of the accused persons. He went, and made a further information, and on that occasion said, "I came here to save myself." No caution was given on this occasion, and he was bound over to prosecute, and was considered by the magistrate as an approver. The prisoner was not then in custody, nor was there any charge against him. Subsequently he refused to prosecute, and was then arrested, tried, and convicted. At the trial his own informations were used against him:*

*Held (Monahan, C.J., and Keogh, J., dissentientes), that the informations were not properly received, and that the conviction was consequently bad:*

*Per Fitzgerald and Deasy, BB.—The first information was rightly received, as the prisoner gave no intimation of the expectation under which he made the information; but the second was inadmissible.*

**T**HIS was a case stated by Keogh, J., for the opinion of the Court. The prisoner was convicted of treason felony at the Special Commission, in Green-street, and sentenced to five years' penal servitude.

(a) Reported by W. MULHOLLAND, Esq., Barrister-at-Law.



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Mr. J. C. Stronge was examined as witness at the trial.—I am one of the divisional magistrates for the city of Dublin. I prove certain depositions of the prisoner; the first taken on the 27th of September, and resworn with a further information on the 5th of October, 1865. The prisoner made the information on oath, and signed it in my presence. He was produced by a member of the police as a person wishing to give evidence for the Crown. I examined him as to pike-making. I did not then know that he knew anything of the conspiracy; his statements came out one after another as I pursued the subject. I did not look on him as an informer, but as an ordinary Crown witness. He was not in custody then. I swore him; I gave him no caution whatever, and did not consider he would implicate himself. I did not caution him the second time either (5th of October). I did consider him on the second occasion in the light of an approver. Not the slightest inducement was held out to him on the first or second occasion by me or by anyone to my knowledge.

Charles Smith (a detective) examined.—On the 26th of September I went to prisoner's house and said, "I understand you have a forge." Prisoner then volunteered a statement that he had let the forge to one Michael Moore, and that Moore and others were accustomed to make pikes there. I left and returned the next day, and asked him was he willing to come and state to the superintendent what he had told me. He said he was, and came away perfectly voluntarily. I did not hold out the slightest threat or inducement to him to make him give evidence. He told me he had attended Fenian meetings, and was a sergeant in the society. This conversation went on while I was searching. On the 5th of October I returned, and asked him to come and hear his informations read before the accused. He at once came. He was not in custody.

Superintendent Ryan examined.—I brought Gillis down to the magistrate. He came voluntarily. I introduced him. I never held out any threat or inducement whatever. I asked him had he any objection to give information. He said he had not. I did not tell him he ought not to criminate himself. I knew from his own voluntary statement that he was implicated in the conspiracy. I asked him whether he was willing to make that statement to a magistrate, and he said he was. I then, in the prisoner's presence, said, "There is a man called Gillis, and would your worship hear what he has to say?" I understood him to go before the magistrate as a witness, and I am sure he understood the same.

During the progress of the case, the Crown tendered in evidence the prisoner's informations of the 27th of September and the 5th of October. Counsel for the prisoner objected to their reception, as having been made under an expectation that the prisoner would be taken as an approver or witness, such expectation having been induced by the conduct of persons in authority; and that, being on oath, he was bound to answer all

questions put to him unless he said it would criminate himself to do so.

The learned judge received the informations, reserving the point as to the legality of such reception for the Court of Criminal Appeal. The informations contained various self-criminating statements, implicating the prisoner in the Fenian conspiracy. The prisoner was asked, on cross-examination, while making the informations of the 5th of October, "How much do you expect for this job?" and he replied, "I swear I expect nothing; I came to save myself." The prisoner subsequently refused to prosecute the persons he had informed against, and was then put on his trial by the Crown. This last fact, however, was not in evidence.

*Butt*, Q.C., and *Waters*, for the prisoner.

*Heron*, Q.C., and *J. E. Walshe*, Q.C., for the Crown.

The authorities cited on both sides were as follows:—*Rudd's case*, Leach C. C. 115; *Reg. v. Johnston*, 15 Ir. Com. Law R. 60; *McHugh's case*, 7 Cox Crim. Cas. 483; *Reg. v. Bentley*, 6 C. & P. 148; *Reg. v. Lewis*, 6 C. & P. 161; *Reg. v. Baldry*, 2 Den. Cr. C. 430; *Reg. v. Wheeley*, 8 C. & P. 250; *Reg. v. Davis*, 6 C. & P. 177; *Reg. v. Owen*, 9 C. & P. 238; *Hall's case*, 2 Leach C. C. 559; *Reg. v. Boswell*, 1 Car. & M. 584; *Reg. v. Burley*, 2 Stark. Ev. 13, n.

O'HAGAN, J.—I may say at once that my judgment will rest entirely upon a consideration of the first of the objections in the case stated. I do not consider the fact of their being made on oath would render the informations inadmissible, provided they were made voluntarily and spontaneously; the real question in the case is the objection that the prisoner made the depositions under the expectation that he would be relieved from the penal consequences of his guilt by being accepted as an approver. All the cases cited to us result in, or are consistent with, an honourable principle in our law, expressed in Lew. C. C. 125, "that a self-criminating statement cannot be evidence against a prisoner if he have made it under any expectation of advantage or fear of injury." A qualification of this doctrine was introduced by Patteson, J., in *Reg. v. Taylor*, viz., that the inducement or threat must be made by some person in authority. On this, however, there seems some difference of opinion: (*Reg. v. Spenser*, 7 C. & P. 776.) As these informations, however, appear to me inadmissible in either view, it will not be necessary to discuss that question. I think the question must be put thus—Was the prisoner induced by a person in authority to make the informations criminating himself, on which the Crown has relied, by the hope of obtaining the immunity of an approver? I think he was, and that the information was, therefore, improperly received and submitted to the jury. The prisoner's position was this when he made the information. The police came to his forge, and he then voluntarily made a statement to them. [His Lordship then detailed the conversation between the prisoner and the detective.] All this conversation was given in evidence without any objection, and very properly so, as it was

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made without any objection whatsoever; and it might in itself have been sufficient to procure a verdict against him. The police, however, were not to be satisfied with a single conviction. They brought him before a magistrate, perfectly voluntarily no doubt, for when asked he said he had no objection to do so. There he detailed his own guilt and that of others; was pressed and interrogated for further evidence, without caution, and disclosed fully the entire case against himself. In the first place, there cannot be any doubt that when he did all this he was virtually in custody. He had confessed his guilt, and was in the power of the police; it was their duty to arrest him, and undoubtedly they would have done so if he had refused to become approver. In the next place, he was asked to give this evidence by a person having authority instantly to arrest him and give him up to justice if he hesitated to swear against his confederates; and finally, he became a Crown witness, in the reasonable expectation that he would escape punishment as a return for his accepted services in bringing other offenders to justice. This being so, the prisoner made his information under an inducement of hope held out by a person in authority, and that confession cannot be made admissible by his refusal to keep his bargain with the Crown. We have in evidence, not only the prisoner's own declaration of his hope of safety, but the conduct of the magistrate shaped on the belief that that hope was well founded. I do not dwell on the mere existence of the hope in the prisoner's mind. No doubt every admission is inspired by some hope; but it is because that such hope appears to me to be the reasonable result of a communication from a person in authority that the confession becomes inadmissible. This is the substance of Baron Gurney's decision in the cases from C. & P. cited to us. The case of *R. v. McHugh* (7 Cox Crim. Cas. 483) appears to me a much stronger case than the present; and it has been expressly decided that no confession made with "a view, and under the hope, of being thereby permitted to turn King's evidence" is inadmissible: (*Hall's case*, 2 Leach 559; 3 Russ. on Crimes, 373.) However, we have been much pressed with *Reg. v. Burley* (*supra*), which was cited to support the argument that, even though this be so, a prisoner who, after being accepted as an approver, declines to give evidence against his accomplices, may be tried and convicted on his own confession. I do not think that case affects the present. It merely establishes that if the approver break his bargain with the Crown he shall not be allowed the benefit of it, but the witness and the prosecutor are relegated to their original positions. If the prosecutor then can make out his case by legal evidence, by confession or otherwise, the prisoner must abide by it. But that is no authority for convicting him on illegal evidence, on a confession not voluntarily made, and with the inducement of hope or fear. I have no fear that this decision will have any of the injurious consequences predicted by the counsel for the Crown. It is, in my opinion, strictly in accordance with the rudimental doctrines of law by

which the subject's liberty is protected, and will not give any immunity to the approver who refuses to supply the evidence he had contracted to furnish. The moment he does so he may be put in the dock as if he never had any connection with the Crown, with all the disadvantage of the disclosures he has made against himself, as a means for the Crown to obtain further independent evidence against him, although they cannot be directly used at the trial. I am of opinion that this conviction should be quashed.

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DEASY, B., thought the second deposition of the prisoner inadmissible.

FITZGERALD and O'BRIEN, JJ., and HUGHES, B., concurred with O'HAGAN, J.

FITZGERALD, B.—I think the information of the 27th of September was admissible against the prisoner, but the second was not properly received. There are three conditions necessary to render a confession inadmissible: (1.) The existence of a charge made against, or a suspicion attached to, a prisoner. (2.) The presence of a person in authority. (3.) Some reason to infer that the admission is made under the influence of hope or fear, sanctioned in some way by such person in authority. The prisoner here was on both occasions under suspicion, and by his confession he placed the constable in the position of a person in authority. It is clear there was no express promise on either occasion. Nor on the 27th of September is there any means of determining what, if any, hope existed in the prisoner's mind, still less of discovering any sanction from the officer. The magistrate was not told that the prisoner was implicated, though no doubt he continued to ask questions after he discovered that he was so implicated. But to rely with any weight on the conduct of the magistrate as sanctioning the hope created by the usage of receiving approvers' evidence, there must be some intimation to him that the prisoner so hoped. As no such intimation was made on the 27th of September, I think the information made on that day admissible. But on the 5th of October, a clear intimation was given by the prisoner of his expectation, and this we must take to have been sanctioned by the magistrate by his conduct. The information made on that day was therefore inadmissible.

KEOGH, J.—I regret that I am obliged to differ from the opinions expressed by the members of the Court who have preceded me. It is remarkable in this case that, if the informations had never been used, there was sufficient evidence to have convicted the prisoner, assuming, of course, that the jury believed it. When the informations were objected to, they might have been withdrawn, and the case of the Crown would have suffered little or nothing by such a course. The counsel for the Crown, however, acting in that spirit which characterised them throughout the prosecution, agreed to give the prisoner the benefit of any question he could raise on the legality of their reception, and in that course I, as presiding judge at the trial, entirely concurred.

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What, then, are the circumstances under which these admissions were made? Gillis has been improperly spoken of as "the prisoner" at the time of the making of these informations. He was not a prisoner; there was no charge whatever against him. [His Lordship read the evidence up to the making of the first information.] What is there in the four corners of this evidence to lead any rational man to suppose that the least particle of inducement was held out to make this man confess? However, on the second occasion he made the statement, "I came here to save myself." Now, I do not think a due consideration has been given to the rule which excludes certain confessions made by a prisoner. Surely a confession is not to be excluded unless the Court is clear that no motive of any kind operated in the mind of the person making it. It is almost impossible to suppose such a case. It is not the operation of every motive which will render a confession inadmissible. Motives of cupidity, vindictiveness, revenge, will not affect it. An exhortation to tell the truth, though coming from a person in authority (*Reg. v. Baldry*, 2 Den. Cr. C. 430), an appeal to a person's religious feelings, however powerful, in inducing him to confess, will not invalidate his confession: (*Gillam's case*, 3 Russ. on Crimes, 405; *R. v. Warner*, *Ib.* 395.) And the reason is that these are not motives likely to make his confession false. In Mr. Greaves's edition of Russ. on Crimes, the learned editor says the proper question is whether the inducement held out is likely to make the confession untrue. The fact that this man had an idea that he would derive some benefit from his confession was not likely to make it untrue. I think the case of *Reg. v. Ohidley* (8 Cox Crim. Cas. 365) is exactly similar to the present case, and I must regard it as a high authority considering the great judge who decided it. In that case, as here, the great point was that the proposal to confess came from the prisoner himself. As to *McHugh's case* (*ubi supra*), I think the difference between that case and the present is vital. McHugh was in custody, Gillis was not. I think the informations were properly received, and it would be dangerous to the administration of justice to hold otherwise.

MONAHAN, C.J., agreed with KEOGH, J.

LEFROY, C.J., agreed with the majority.

*Conviction quashed.*

Attorney for the Crown, *The Crown Solicitor*.

Attorney for the prisoner, *J. Lawless*.

## Ireland.

## COURT OF CRIMINAL APPEAL.

*November 26 and 27, 1867.**(Before Pigot, C.B., O'BRIEN, O'HAGAN, and MORRIS, JJ., and  
FITZGERALD, B.)*

REG. v. TOOLE.

*Treasure trove—Indictment.**It is not necessary in an indictment for concealing treasure trove to  
allege an inquisition before the coroner, or to show the title of the  
Crown by office found.**And a conviction for concealing treasure trove is good, although no  
proof has been given of such inquisition or office found.*

THIS was a case reserved for the opinion of the Court by Mr.  
Justice Fitzgerald and Mr. Baron Deasy.

The prisoner was tried at the Commission Court for the county  
and county of the city of Dublin, on the 11th of February, 1867,  
upon a charge of concealing treasure trove. The following is a  
copy of the indictment:—

County of Dublin, } The jurors for our Lady the Queen upon  
to wit. } their oath present that on the 30th of  
June, 1866, Peter Toole, then of Gardiner's-row, Booterstown,  
labourer, while working at and digging out a sewer being con-  
structed on certain premises at South-hill, near Booterstown  
aforesaid, in the parish of Booterstown, and county of Dublin, did  
find hidden under the ground and soil of said premises certain  
treasure of silver, of the value of 14*l.* and upwards of lawful money  
of Great Britain and Ireland, and which said treasure was of  
ancient time hidden as aforesaid, and the owner whereof at the  
time when the same was so hidden cannot now be found, and that  
our Lady the Queen, in right of her Royal Crown, and by virtue  
of her prerogative royal, is, and at the time of the said finding was,  
entitled to the said treasure so found as aforesaid; and upon their  
oath aforesaid do further present that the said Peter Toole from  
thence hitherto did unlawfully, wilfully, and knowingly conceal



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the finding of the said treasure from the knowledge of our Lady the Queen, against the peace of our Lady the Queen, her Crown and dignity.

And the jurors for our Lady the Queen upon their oath do further present that on the 30th of June, 1866, Peter Toole, then of Gardiner's-row, Booterstown, labourer, while working at and digging out a sewer being constructed on certain premises at South-hill, near Booterstown aforesaid, in the parish of Booterstown, and county of Dublin, did find hidden under the ground and soil of said premises certain treasure of silver to the value of 14*l.* and upwards of lawful money of Great Britain and Ireland, and which said treasure was of ancient time hidden as aforesaid, and the owner whereof at the time when the same was so hidden cannot now be found, and that our Lady the Queen, in right of her Royal Crown, and by virtue of her prerogative royal, is, and at the time of the said finding was, entitled to the said treasure so found as aforesaid; and upon their oath aforesaid do further present that the said Peter Toole from thence hitherto did unlawfully, wilfully, knowingly, and fraudulently conceal the finding of the said treasure from the knowledge of our Lady the Queen, against the peace of our Lady the Queen, her Crown and dignity.

Joseph Ryan was a fellow-labourer with the prisoner, and was engaged with him in making a sewer near Booterstown. While working at a depth of 2ft. 6in. below the surface prisoner struck an earthenware crock with a pick, and split it, whereupon some coin fell out. Prisoner desired witness to keep a look out while he picked up the coin, and promised that they should share it in equal parts. The prisoner then picked up the coin and carried it off. Witness and prisoner sold some of the coins afterwards.

Constable Thomas Dolan proved that he found twenty-six pieces of silver coin, now produced. (The coins handed up to the Court appeared to be of the reigns of Elizabeth and Charles and the Commonwealth.) Found the coins inside the palliasse of prisoner's bed. On searching his person I found a 10*l.* bank note. Prisoner told him he had found the coins, with others, while working, and that he had sold the remainder.

John Joseph Dunn, in the employment of Mr. Donegan, a jeweller, bought 61 ounces of old silver coins of Elizabeth and James from the prisoner at 4*s.* 10*d.* per ounce. The prisoner brought him the coins, told him that he had found them at Booterstown, and gave his name and address quite correctly.

The learned judge directed the jury that if they were satisfied that the coin in question was silver buried or hid in the earth at such time and under such circumstances that the owner could not be known, the Queen was entitled thereto on the finding thereof; and that if the defendant found it and knew it to be silver, and with such knowledge so concealed the finding as to satisfy them of his intention to appropriate it, or any part of it, to his own



use, and deprive the person entitled of it, they ought to find him guilty of the charge. They were also told, on the authority of *Reg. v. Willett* (9 Cox Crim. Cas. 376, to which reference was made by the counsel for the Crown) that there was no substantial difference between the counts of the indictment.

The defendant was convicted on the first count.

The learned judges reserved for the consideration of the Court the questions following :

(1.) Whether the indictment was sufficient, without referring to or stating any inquisition before the coroner or office found, as to the title of the Queen ?

(2.) Whether the evidence was sufficient to sustain the indictment, without showing any inquisition before the coroner or office found, as to the title of the Queen ?

*J. A. Curran*, for the prisoner.—This treasure becomes the property of the Crown when it is proved to be without an owner. The proper legal evidence of there being no owner is the inquisition and office found before the coroner. One department of the coroner's duty is to inquire whether there be an owner or not, and there is no evidence of title in the King till the inquisition is produced: (stat. 4 Edw. 1; *Jervis on Coroners*, pp. 45, 46; *Precedents*, pp. 336-7.) This is the practice in England: (*Thomas's case*, Leigh & Cave 313; Stanford's "Pleas of the Crown," p. 39.) Larceny of treasure trove cannot be maintained till office found: (3 Inst. 108.)

*Warren*, Q.C. (Attorney-General), *Harrison*, Q.C. (Solicitor-General), and *T. P. Law*, for the Crown, cited Stanford on Prerogative, pp. 55-6; Co. Litt. 113; 1 Salk. 382; 1 Black., W. 290; 2 Black., W. 409; 2 Russ. on Crimes, 296.

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*Pigot*, C.B., now delivered the judgment of the Court.—We are of opinion that it was not necessary to show any inquisition before the coroner or office found as to the title of the Crown. It therefore becomes unnecessary for us to consider one question apart from the other. In Stanford on Prerogative the author discusses and explains (pp. 55, 56) the cases in which it is necessary and in which it is not necessary that there should be an inquisition finding property to belong to the Crown a complete title to the property. After stating those cases (as where the subject-matter is an interest in lands) in which the King must be seised by office found, he proceeds thus:—"Other prerogatives the King hath, which extend only to personal and transitory things: *ad bona et catalla felonum, wrecke de mare, tresour trove*, or the profits of lands of clerks convict of felony, or of persons outlawed in a personal action, to these things it seems the King is entitled although there be no office or other matter of record found of them as it should appear"; and some passages are cited

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from the Year-Books which appear to the author to warrant this statement. Stanford's book on Prerogative (as well as his treatise on Pleas of the Crown, which is often cited in the text of Lord Coke's reports) is a work of considerable authority. I cite it as an evidence of what in his time was the opinion of the Profession on the subject. A similar distinction is made between property of a freehold nature and chattels in the case of *Ayloff v. Windham* (Jovelle's Rep. p. 8, case 19); in *Woodward v. Fox* (2 Vent. 170); in *Harvey v. Watt* (1 Roll. 326); in *Harpur v. The Bailives and Burgesses of Derby* (Sir W. Jones 426); and in the argument of the Recorder of London in *Rex v. The Earl of Nottingham* (Lane's Rep. 43). Treasure trove is not, it is true, mentioned in those cases. But the "ground of the distinction," according to which it was deemed not necessary that office should be found was, that the subject-matters were goods and chattels ("transitory chattels," according to the phrase used in some of the books), or of the nature of chattel property. One of the strongest illustrations of the law laid down as to treasure trove by Stanford, in the passage which I have cited, is to be found in the case of *The King's Prerogative in Saltpetre* (12 Rep. 13), to which I have been referred by Mr. Baron Fitzgerald. I think a short note of it was cited during the argument from Viner's Abridgment (tit. "Treasure Trove," pl. 12). The resolution of the Court, as reported by Lord Coke, is as follows:—"It was resolved that this taking of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm. And for this cause, as in other purveyances, it is an incident inseparable to the Crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the Ministers of the King (as other purveyances ought), and cannot be converted to any other use than for the defence of the realm, for which purpose only the law gave the King this prerogative. And it is not like to the mines of gold and silver, for there the King hath interest in the metal, and therefore there he may dig for it; *quia quando lex aliquid alieni concedit, concedere videtur id, sine quo res ipsa res esse non potest*. (See Plowden in 'Le Case de Monies.') So the King may dig in the land of the subject for treasure trove, for he hath property." According to the law as to treasure trove, it would seem that the property might become vested in the Crown before it was dug out of its place of concealment, and therefore before the particulars of the hidden treasure were ascertained for the purpose of being described in the inquisition. The law, as stated by Stanford in reference to treasure trove, is adopted by Mr. Chitty in his treatise on Prerogative, p. 259: "As to personalty, the general rule seems to be that the King is entitled without office or other matter of record, as in the case of goods and *choses in action* of felons, wreck of the sea, treasure trove, or the profits of lands of clerks, &c., convicted of felony, or of persons outlawed in a personal action." The general proposition that the goods of a felon

become vested in the Crown upon the forfeiture, without office found, is indeed now so well established that it hardly needs a reference to authority to illustrate it. It was so decided in 12 Car. 2, in *Rex v. The Executors of Wentworth* (1 Lev. 8), and in the two modern cases of *Bullock v. Dodds* (2 Barn. & Ald. 258, cited in the argument), and the subsequent case of *Lambert v. Taylor* (6 B. & C. 158), the rule was applied to *choses in action*, such as a bill of exchange. Lord Tenterden, in his judgment in *Bullock v. Dodds*, treats simple contract debts as instantly seised into the King's hands upon outlawry. Speaking for myself, I must say it seems to me difficult to conceive why the forfeited goods and *choses in action* of a felon should become vested in the Crown immediately upon the forfeiture, and treasure trove should not be similarly vested immediately upon the finding. In each case, so far as the Crown is concerned, the particulars of the property are for the most part unascertained. There is no more a record of the goods or *choses in action* of the felon than there is of treasure trove. It is true that before the Crown has acquired the possession of the treasure trove (or before it is seised, as the phrase is, into the hands of the Sovereign by inquisition) a person cannot be indicted for larceny of this species of property: (3 Inst. 108; 1 Hale P. C. 510; 2 Hawk. P. C. c. 19, s. 38.) But this is plainly a result of the nature of the offence of larceny, by which the asportation (that is, the taking and carrying away of the goods) from the possession, actual or constructive, of the owner is an essential element. It is also true that, by the stat. 4 Edw. 1, s. 2, it is enacted, "That a coroner being certified by the King's bailiffs, or other honest men of the country, shall go to the places where treasure is said to be found." And it is further enacted, "That a coroner also ought to inquire of treasure that is found, who were the finders, and likewise who is suspected thereof; and that may be well perceived where one liveth riotously, haunting taverns, and hath done so of long time: hereupon he may be attached of this suspicion by four or six or more pledges if he may be found." And it appears by the case of *Reg. v. Cullingford* (1 Salk. 382, cited by the Solicitor-General), and from the recent case (cited by Mr. Curran) of *Reg. v. Thomas* (9 Cox Crim. Cas.; Leigh & Cave 313), the practice exists in England of trying the prisoner upon a charge of concealing treasure trove, both on an indictment and on the inquisition of the coroner at the same time. The course of proceeding upon the statute of 4 Edw. 1 is mentioned in Stanford's P. C. 39, 40; but there is nothing in that statute which at all affects any right of the Crown to the immediate property in treasure trove when discovered which the Crown possessed irrespectively of that act of Parliament; and it plainly was a legislative provision, framed for the purpose of giving effect to the rights of the Crown, by casting upon a public officer, the coroner, the responsibility of at once, upon the discovery of the existence of treasure trove, instituting an inquiry with a view to ascertain the property and its

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particulars, and to bring the concealer of it to justice. It is well known that in times of public trouble the insecurity of property led to its being often concealed by the owners, who in various ways were disabled from returning to seek it in the place of its concealment. In those periods, therefore, it was a much more valuable source of the Crown's casual revenue than it has been in later times. The authorities to which I have referred, and the analogy afforded by such of them as do not directly deal with treasure trove, appear to me to show beyond any reasonable doubt, in the absence of any opposing authority, that such a prosecution as the present is maintainable without office found. The case of *Reg. v. Thomas* appears to me not to be an authority for either side in this argument—not for the Crown, because not only was there in that case an inquisition of office, but the prosecution was, in fact, founded upon it as if it had been an indictment; not for the prisoner, because the case reserved by the judges expressly sought the decision of the Court of Criminal Appeal upon the question “whether the indictment and inquisition, or *either of them*, is sufficient in law?” The argument was applied altogether to the indictment; though certainly on matters which seem to have been equally presented by the inquisition. In conclusion, I must observe that the very nature of the subject-matter with which we are here dealing seems to me to furnish, in the absence of any direct opposing authority, persuasive reasons for making the decision we are about to pronounce. If such a prosecution as the present cannot be maintained unless the property has been first made the subject of an inquisition in order to seize it into the possession of the Crown, a prosecution would, in many cases, be rendered difficult if not impossible. The finder and concealer of treasure trove might melt down the precious metal found, might procure it to be converted into coin, or might sell it for purposes of manufacture long before the Crown or the coroner could take any proceeding, under the stat. 4 Edw. 1. And it would seem very like a legal solecism to say that gold and silver, the exact nature, amount, and particulars of which were only known to the finder, should, for the purpose of seising it into the Queen's hands, be made the subject of an inquisition of office preliminary to a prosecution when the precious metals (though it may be capable of proof that some such treasure was found and concealed) have been coined and expended and dispersed in the shape of money long before it was possible to hold an inquisition or to institute a prosecution. It may be difficult or perhaps impossible to procure testimony, to specify, or to enable an inquest jury to find the particulars of the goods for the purposes of an inquisition; and yet it may be not difficult to obtain, for the purpose of a prosecution, evidence to show that *some* property, capable of being, in law, the subject-matter of treasure trove, was, in fact, found and was concealed by the culprit. The decision of the Court is that the conviction be affirmed.

## Ireland.

## COURT OF QUEEN'S BENCH.

*January 25, 29, and 31, 1868.*

(Before WHITESIDE, C.J., O'BRIEN, FITZGERALD, and GEORGE, JJ.)

REG. v. AUGUSTINE COSTELLO. (a)

*Practice—Fees of the Attorney-General—Error.*

*There is no legal authority for the fee of fifteen guineas hitherto demanded by the Attorney-General for perusal and consideration of a memorial for a writ of error.*

*Quære. May the Attorney-General consider an application for a writ of error made to himself in person as in England; or is he bound to wait for a memorial to the Lord Lieutenant and the reference to him of such memorial?*

THIS was a motion for a conditional order for a *mandamus* to the Attorney-General to hear and determine whether his fiat for a writ of error should go without the demand of a fee of fifteen guineas. The affidavits having been opened, it was agreed, on the suggestion of the Court, that notice of the application should be served upon the Attorney-General, and the whole question argued without the conditional order.

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*January 29.*

*Heron, Q.C. (Molloy with him) now moved upon notice in the same terms the affidavits of the prisoner, and his attorney stated that the prisoner had been tried and convicted of treason felony, and sentenced to twelve years' penal servitude. That several important questions of law both on the pleadings and on the constitution of the jury had arisen, and were now placed on the record by pleas in abatement, puis darrein continuance, and challenges to the poll. That, upon the 14th of January, the usual memorial was forwarded to the Lord Lieutenant by the*

(a) Reported by W. MULHOLLAND, Esq., Barrister-at-Law.

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prisoner praying for a writ of error, which memorial was accompanied by the usual certificate of counsel, and by a letter stating that the prisoner was an American citizen, and entirely without means to pay the usual fee of fifteen guineas, and asking that it should be remitted in this instance. To this letter a reply was sent on the 22nd of January, by Sir T. Larcom, the Under-Secretary to the Lord Lieutenant, saying that "his Excellency saw no reason why the usual fee should be remitted." The affidavits further submitted that no authority was to be found for this demand in any of the books of criminal law, and that no such demand is ever made in England.

In answer to these affidavits an affidavit was sworn by Thomas Lynch, who said that he had been clerk to the Attorney-General for the time being for thirty years; that the practice had been that the applicant presented a memorial to the Lord Lieutenant, accompanied by such documents as might be necessary; that upon the presentation of such memorial the applicant lodged fifteen guineas in the Crown Office for the fees of the Attorney-General and his clerk; that during his experience the fee had invariably been paid, except in the case of Daniel O'Connell, when it was remitted by the Attorney-General of the day.

*Heron, Q.C. (Molloy with him)* in support of the application.—No authority for this fee can be produced. It is not mentioned in any book of Irish criminal practice, nor is there any statutable authority for it. It cannot rest on prescription, as its amount is sufficient to rebut the presumption that it existed in the reign of Richard II.: (*Bryant v. Foot*, 2 Law Rep. Q.B.161.) In the reign of Richard II. this sum would have been equivalent to 484*l.* 12*s.* 3*d.* present money. It is unreasonable to expect a convicted felon, whose goods and lands are forfeited to the Crown, to pay such a sum. If a felon is not entitled to a writ of error, *ex debito iustitiae*, at all events he is entitled to have the question considered. Such a demand was termed by Sir A. Harte (Lord Chancellor) a "toll-bar on the road to justice:" (*Roe's case*, 2 Molloy 29.) Such a fee is repugnant to the principles of our law: (2 Inst. 209; 1 Stat. W. 26.) It is impossible that it could have been exacted in the great majority of cases where writs of error have been granted in this country, as the position of the parties would not permit their payment of it. [Counsel read the names of a number of cases where writs of error had been granted to persons of very humble circumstances.] It is not law to say that the Attorney-General can only act upon reference to him of the case by the Lord Lieutenant. There is no mention of a memorial in the books. In 2 Gabb. Crim. Law, 576, it is stated that the practice is to send the record and counsel's certificate to the Attorney-General. The only mention of anything like a memorial is the statement that it was formerly the practice to petition the Attorney-General; but that is no longer done. The ancient practice is more constitutional, as the Attorney-General is the Queen's officer, not the Lord Lieutenant's. The



practice in England is to apply to the Attorney-General, not to the Crown, or any Minister of the Crown. The error of applying by memorial to the Lord Lieutenant in Ireland has arisen out of a misapplication of the 21 & 22 Geo. 3, c. 49, s. 3 (Ir.), which directs a memorial or petition to the Lord Lieutenant, where a writ of error returnable into Parliament is sought; and upon such a memorial being presented, the statute directs a fee of 3*l.* to be paid. The object of this statute was to remedy certain doubts and disputes which had arisen as to whether writs of error returnable to Parliament should be returned to the Irish or the English House of Lords. No other fee is payable for any writ of error except a fee of 10*s.* to the petty bag officer. In Grady and Scotland's Q. B. Practice, pp. 79 and 334, and Gude's Practice, mention is made of a fee of 8*s.* 8*d.*

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Harrison, Q.C. (Solicitor-General), and Lawson, Q.C., for the Attorney-General.—If a *mandamus* be issued in this case to the Attorney-General, it will be useless, as the return to the writ must be that he has received no memorial or application for the writ of error. The Attorney-General has no power to consider whether a writ of error shall issue, until he is set in motion by the Lord Lieutenant. The Attorney-General is the Queen's officer, it is true, but upon this question of granting writs of error the Queen has deputed her powers to the Lord Lieutenant. His commission deposes to him the power of pardoning, punishing, &c., all criminals. In England the practice has been dispensed with, because the Attorney-General is the Queen's officer, and his fiat gives the assent of the Crown; but here the Lord Lieutenant represents the Crown, and you cannot substitute the Queen or the Queen's officer for him. The writ of error is not granted on the fiat of the Attorney-General. The Attorney-General advises the Lord Lieutenant, and upon his advice the secretary directs the writ to issue. The Attorney-General never had the memorial referred to him. If a *mandamus* goes it must be to the Lord Lieutenant. [FITZGERALD, J.—The writ does not issue on the consent of the Lord Lieutenant, but of the Attorney-General. Your argument does not, therefore, stand the test of practice.] The Attorney-General consents merely as the legal adviser of the Lord Lieutenant. [O'BRIEN J.—In the present case it is clear, from the Under-Secretary's letter, that the only reason for not referring the memorial was the absence of the fee. The question of the legality of the fee is, therefore, the substantial one.] The fee has never been questioned as a matter of right, though it has frequently been omitted. [In the course of the argument FITZGERALD, J. produced a "Return of all Fees paid to Officers of Justice, made in Pursuance of an Order of the Irish Houses of Parliament," dated 1733. In the list of fees payable to the Attorney-General no mention was made of the fee in question; and one of the items was as follows: "Fee payable upon consent to any writ, where such consent necessary, 2*l.* 6*s.*"]

Molloy, in reply.—A *nolle prosequi* is entered by the Attorney-

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General upon his own responsibility. If the argument for the Attorney-General is correct, it should be entered in the name of the Lord Lieutenant.

WHITESIDE, C.J.—It is not necessary to decide two important questions which arise on this motion, and we must not be taken to express any opinion upon them. First, the constitutional question as to the position of the Attorney-General in relation to the subject and the Crown; and next, the question whether a person convicted of treason or felony is entitled as of right to have his claims for a writ of error considered and determined upon by the Attorney-General. Upon the remainder of the question, however, we are clearly of opinion that no foundation in law can be shown for this fee as a condition precedent to such consideration of those claims. There is nothing wonderful in the fact that it has been paid in many cases. But where it is sworn that the person demanding the writ is in a state of poverty, and it is put to us as a question of right, we cannot withhold our opinion on the subject. The case of *Bryant v. Foot* would show that this fee cannot rest on prescription, even in the absence of the return of fees produced by Mr. Justice Fitzgerald, which shows conclusively that the demand is of no antiquity. It will be well for the Crown to consider what they will do and inform the Court at an early day, so as to avoid any awkwardness in dealing with this motion.

January 31.

The Solicitor-General now read the following written statement:

“The Attorney-General has instructed me to say that in the case of A. E. Costello he is prepared to advise his Excellency, after the intimation given by the Court, to receive the memorial of the prisoner without requiring the lodgment of the usual fee of fifteen guineas, and that a like practice be observed for the future in similar cases. The Attorney-General further desires me to say that he makes this intimation to the Court on the supposition that the Court will either refuse the present motion or pronounce no rule upon it; that he is under the impression that he has no power to entertain any application for the issuing of a writ of error unless submitted to him by the Lord Lieutenant.”

*Heron*, Q.C., applied that, if no rule were pronounced upon the motion, a statement of the opinion of the Court already expressed upon the illegality of the fee should be incorporated in the order.

The Solicitor-General objected, but the Court held that the rule should contain an expression of opinion that the fee was illegal.

*Rule accordingly.*

Attorney for the Crown, *The Crown Solicitor*.

Attorney for the prisoner, *J. Scallan*.

## COURT OF CRIMINAL APPEAL.

*April 25 and May 2, 1868.*

(Before KELLY, C.B., KEATING, J., PIGOTT, B., M. SMITH, J., and HANNEN, J.)

REG. v. J. A. CRAB.(a)

*False pretences—Obtaining money by pretending to carry on a certain business.*

*The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk. The jury found that the prisoner was not carrying on that business at all :*

*Held, that this was an indictable false pretence.*

CASE reserved at the Middlesex Sessions for the opinion of this Court.

John Augustus Crab was tried at the Middlesex Sessions on the 27th of March, 1868, for having obtained various sums of money from several persons by false pretences with intent to defraud.

The pretences relied upon were, that he was, at the time he obtained the moneys, carrying on an extensive business as a surveyor and house agent, and that he had employment for several clerks to collect rents and assist in the conduct of his said business.

By these pretences he induced individuals to deposit sums of money with him as a guarantee for their honesty, and it was proved that he was not carrying on an extensive or any business as a surveyor or house agent, and that he had not any employment for several or any clerks to collect rents or to assist in the conduct of any business whatever.

The prisoner's counsel declined to address the jury on the facts, and relied on the objection that the above pretences were not, in point of law, sufficient to sustain a criminal charge.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The prisoner was found guilty, and sentence was deferred.

He is now in the House of Correction, in and for the county of Middlesex, awaiting the decision of this Honourable Court upon the above objection.

The question I have to submit to this Honourable Court is, whether the pretences above set forth are or are not sufficient, in point of law, to sustain the charge upon which the prisoner was convicted.

WM. H. BODKIN, Assistant Judge.

*April 25.*—The Court desired the case to be re-stated.

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*May 2.*

In obedience to the order of the Court, the following additional statement of facts was added to the case :

James Hawkins was induced by an advertisement in the *Times* to see the prisoner, who was found in the occupation of a room in Margaret-street, Cavendish-square, having the appearance of an agency office. The prisoner said that he was the advertiser, and wanted several clerks to assist in carrying on his business as a surveyor and house agent, that his business was of great extent, and that as the clerks he wished to engage would be entrusted to collect rents to a large amount, he should require the sum of 25*l.* to be deposited with him by each as a security for his honesty.

In consequence of these pretences, James Hawkins was induced to hand 25*l.* to the prisoner.

James Carmichael was induced by the same pretences to give the prisoner 10*l.*, and several other witnesses proved that they were about to deposit money with the prisoner under similar circumstances, but that they were prevented doing so by the interference of the police.

It was proved to the satisfaction of the jury that the prisoner was not carrying on the business of a surveyor or house agent; that he had not employment in such trades for any clerks, and that the prisoner's office was opened for the sole purpose of defrauding persons invited to it by the advertisement published by the prisoner.

The prisoner's counsel contended that the pretences used by the prisoner were only exaggerated representations of the extent of his business; but, as the jury found that he was not carrying on any business whatever, I thought the pretences were such as would support the charge against him.

W. H. BODKIN, Assistant Judge.

*April 27, 1868.*

*Montagu Williams*, for the prisoner, applied to the Court to send back the case for the statement of some additional facts that were proved as to the prisoner having done business at the office, and having had applications for servants' situations. The prisoner had an office and books, and the representations as to the extent of the business were only exaggerations. It was a question of degree, and was not the subject of a criminal charge.

*Besley*, for the prosecution.—The business of a servants' office is not the business of a surveyor and house agent, which he represented himself to be carrying on.

*KELLY, C.B.*—As the jury have found that the prisoner was not carrying on any business whatever, and there was the positive allegation of a fact that the prisoner obtained 25*l.* from the prosecutor by falsely pretending that he was carrying on an extensive business as a surveyor and house agent, and that he had employment for several clerks to collect rents and assist in the conduct of his said business, the objection cannot be sustained. Here the false pretence was of an existing fact, which was proved to be untrue, and by means of that the prosecutor was induced to part with his money.

*M. SMITH, J.*—This was not a question of the degree of business carried on by the prisoner, for the jury found that he was not carrying on any business at all as a surveyor or house agent.

REG.  
v.  
J. A. CRAB.  
—  
1868.  
—  
*False  
pretences.*

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 25, 1868.*

(Before KELLY, C.B., KEATING, J., PIGOTT, B., M. SMITH, J.,  
and LUSH, J.)

REG. v. GEORGE HALFORD.(a)

*Larceny—Evidence.*

*The prisoner's wife hired a bedstead at 1s. per week, and within a fortnight afterwards the prisoner sold it to a broker, his wife being present at the sale. Two days after the sale the wife paid 1s. for a week's hire, being all that was paid. There was no evidence that the prisoner knew that the bedstead had only been hired: Held, that a conviction of the prisoner for larceny could not be sustained.*

CASE reserved for the opinion of this Court at the Quarter Sessions of the peace held at Lewes for the Eastern Division of Sussex, on the 14th of October, 1867.

The prisoner was tried on the following indictment:

Sussex } The jurors for our Lady the Queen upon their oath  
to wit. } present that George Halford on the 9th day of  
March, in the year of our Lord one thousand eight hundred  
and sixty-seven, one bedstead of the goods and chattels of  
Stephen Bindon, feloniously did steal, take, and carry away,  
against the peace of our Lady the Queen, her Crown and dignity.

The evidence showed that prisoner's wife went to the shop of the prosecutor on the 28th of February last and hired the bedstead at 1s. a week, and some one fetched it away. No particular term was named for the hiring. The wife subsequently, on the 11th of March last, paid prosecutor for one week's hire, which is all that was paid.

Prisoner, on or about the 9th of March, went to a furniture broker and asked him to buy the bedstead. The broker came to the prisoner's lodging to look at the bedstead, and then bought it and took it away, the prisoner and his wife being both present at the transaction.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



The bill and notice annexed to this case (*infra*) were proved to have been sent by the prosecutor to the prisoner.

The prosecutor never saw or communicated in any way with the prisoner, either before or after the bedstead was taken from the prosecutor's, except by sending the bill and notice above referred to. The prosecutor called once or twice at the prisoner's lodgings, but did not see him.

Counsel for the prisoner objected that there was no evidence of simple larceny, as the possession of the bedstead was not obtained by any trespass.

The Chairman held that the offence, if any, was larceny as a bailee.

Counsel for the prisoner then objected that there was no evidence how the bedstead got into the possession of the prisoner. They did not know what passed between the wife of the prisoner and the prosecutor. The prisoner was not privy to the agreement into which the prosecutor entered with the woman, and as he was never seen by the prosecutor or spoken to on the subject, knowledge of the terms on which possession of the bedstead was given was not brought home to him. Further, it was submitted, that until the actual terms of bailment on which the prisoner came into possession of the bedstead were proved, there could be no evidence of conversion in the nature of a larceny.

The Chairman referred to the payment of one shilling for the hiring.

The counsel for the prisoner submitted that the payment was for sale and after the alleged larceny; that it was not made by the prisoner or brought to his knowledge. The facts were consistent with the woman's having either purchased the bedstead or with her having hired it, but having led the prisoner to believe that she had bought the bedstead, and equally so with her secretly paying one shilling for hiring to prevent her misconduct being discovered.

The case was left for the consideration of the jury, who convicted the prisoner.

Judgment was respited and the prisoner bailed.

The opinion of this Court is requested whether there was any evidence to go to the jury.

CHICHESTER, Chairman.

The following are copies of the bill and invoice :

Sea Side.

Furniture let on hire.

Hip, Sponge, and other Baths let on hire.

Venetian and Roller Blinds made to order.

Eastbourne, July 4, 1867.

Mr. Alford.....Dr. to S. Bindon, Cabinet Maker and Upholsterer.

July 4th.—18 weeks' hire of bedstead, at 1s. per week ..... 18s.

March 11th, 1s.

Pevensy-road, Eastbourne, July 11, 1867.

Mr. Alford.—Sir,—I hereby give you notice to give and deliver up to me, on Thursday next, July 18th, the iron bedstead which you hired of me on the 28th Jan. last.

S. BINDON.

REG.  
v.  
GEORGE  
HALFORD.  
—  
1868.  
—  
Larceny—  
Evidence.

REG.  
v.  
GEORGE  
HALFORD.

1868.

Larceny—  
Evidence.

*Willoughby*, for the prisoner, was stopped by the Court.

*Lumley Smith*, for the prosecution.

KELLY, C.B.—What evidence was there to show that the prisoner knew that his wife had only hired the bedstead?

*L. Smith*.—It was a question for the jury upon all the facts. He was in possession of the bedstead, which had been hired only, and he and his wife were both present at the sale by him. There was evidence of his complicity.

KELLY, C.B.—Why must he have known that the bedstead was hired only, and not bought by his wife? The conviction cannot be sustained.

The rest of the Court concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

April 25, 1868.

(Before KELLY, C.B., KEATING, J., PIGOTT, B., M. SMITH, J., and LUSH, J.)

REG. v. JOHN MARSDEN.(a)

*Assault on constable—Unlawful apprehension—Continuous pursuit.*

*While the defendant was using threatening language to a third person, a constable in plain clothes came up and interfered. The defendant struck the constable with his fist, and there was a struggle between them. The constable went away for assistance, and was absent for an hour; he changed his plain clothes for his uniform, and returned to defendant's house with three other constables. They forced the door and entered the house. The defendant refused to come down, and threatened to kill the first man who came up to take him. The constables ran upstairs to take him, and he wounded one of them in the struggle that took place:*

*Held, that the apprehension of the prisoner at the time was unlawful, and that he could not be convicted of wounding the constable with intent to prevent his lawful apprehension.*

CASE reserved for the opinion of this Court by Mr. Justice M. Smith.

The prisoner was tried and convicted at the Spring Assizes, 1868, at Warwick, on an indictment which charged him with

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

feloniously wounding George Wesson, a police constable, with intent to resist his lawful apprehension.

The facts were that the prisoner lodged at his father's house in Lower Town-street, Nottingham. About twelve o'clock on the night of Saturday, the 29th of February, the prisoner, suspecting a man called Wormald was listening at the windows of the house, came into the street and used threatening language to him. Raison, a police constable, came up and interfered to put a stop to the altercation, and the prisoner then turned upon him and struck him with his fist, and there was a struggle between them. Raison, the police constable, then went away for assistance, and remained absent for an hour.

In the interval he changed his plain clothes for his uniform, and he returned to the house with three other constables, Wesson, Ash, and Harabin. The prisoner had then retired into the house, and all was quiet. The door of the house was closed and fastened. Raison asked the prisoner to open the door, and he refused. The constables tried the door several times, and after an interval of ten minutes or a quarter of an hour, finding they could not get into the house, they determined to send for a sergeant of police. One of them then went to the police station, distant about half a mile, and after another interval of fifteen or twenty minutes, returned with Sergeant Hind. The sergeant and Harabin went to the back door. Raison, Wesson, and Ash remained by the front door. These three constables again demanded admission, and were refused, and they then forced open the front outer door and entered the house.

The constable saw the prisoner standing on the top of the stairs with a bill-hook in his hand. Raison asked the prisoner to come down. He refused, and threatened to kill the first man who came up. Wesson then said, "Here's at him," and the three constables, Wesson, Raison, and Ash ran upstairs to lay hold of him.

The prisoner then struck Wesson with the hook upon the head, and wounded him. A struggle ensued, in which Raison was also wounded by the prisoner with the hook. The prisoner was overpowered, and taken into custody, having himself received severe wounds on the head from the constables in the struggle.

It was contended for the prisoner, that the apprehension was not lawful, the assault was over, there was no further assault or affray to be apprehended, and no such fresh pursuit as would justify the constables in breaking into the house or apprehending the prisoner: (see *Reg. v. Gardener*, Moo. C. C. 390; *Reg. v. Walker*, Dears. C. C. 356.)

I reserved these points for the consideration of this Court. I did not pass sentence, and detained the prisoner in custody.

If the apprehension was not lawful, it is to be taken that there was no excess in this resistance offered by the prisoner.

REG.  
v.  
JOHN  
MARSDEN.

1868.

*Assault on a  
constable.*

MONTAGUE SMITH.

REG.  
v.  
THOMAS  
WESTERN.

1868.

Pleading—  
Indictment—  
Amendment—  
Jurisdiction.

ments, for the purpose of taking and destroying game, contrary to the statute in such case made and provided," and then alleged that the prisoner committed perjury on the hearing of that complaint.

On the evidence it appeared that an information or complaint in writing against Martin and the now prisoner Western was laid before a justice of the borough of Tiverton in 1863. Western was then convicted, but Martin, having absconded, a warrant was issued against him, and he was not taken till 1868, when the complaint against him was heard before the two gentlemen named in the indictment, who were justices for the borough of Tiverton only, and were not justices for the county.

On the hearing of this complaint, Western was called as a witness, and swore that Martin was not the person who was with him poaching on that night; and on this the perjury was assigned.

It was objected that, though the two justices for the borough had jurisdiction to hear the complaint, yet not being justices *in and for the county*, the allegation in the indictment was not proved.

To this it was answered, that the fact that they were justices for the borough, which was within the county, was proof of the averment, or that the words "in and for the county" might be rejected as surplusage.

I was, however, of opinion that the averment being descriptive, required to be proved as laid.

It was then urged that I had power to amend the indictment so as to cure the variance, either under the 9 Geo. 4, c. 15, or the 14 & 15 Vict. c. 100, s. 1.

I thought that the 9 Geo. 4, c. 15, did not apply to this case, and doubted whether the variance came within the meaning of the 14 & 15 Vict. c. 100, s. 1, as though it was a variance in the description of persons in the indictment named and described, it seemed to me doubtful whether those words in the act were not confined to variances *ejusdem generis* with a variance in the name of such persons. I thought, however, that if I had power to make the amendment, it was proper to exercise it, and therefore directed the indictment to be amended by striking out the words "the said county," so as to make the averment be, that they were "justices assigned to keep the peace in and for, and acting in and for the borough of Tiverton, in the said county," subject to the opinion of this Court as to my power to make such an amendment.

It was further objected, that the information or complaint in writing (which was in the same words as those used in the indictment), disclosed no offence, as it did not allege that Martin was in Quarry Down Close for the purpose of destroying game *there*; and *Fletcher v. Oalthorpe* (6 Q. B. 880) was cited in support of this position.

It appeared on the evidence, that the charge actually made and

heard before the justices was for poaching *there*, and I thought that, inasmuch as the justices had jurisdiction over the complaint which was in fact heard before them, the prisoner, if he wilfully gave false evidence with intent to mislead them, was liable to punishment, even if the written complaint was informal; but having reserved the point as to the variance, I reserved this point also.

The case was then left to the jury, and the prisoner was convicted and liberated on bail.

Various other objections were made, which I refused to reserve.

The opinion of this Court is requested—First, whether I had power to amend as I did, and if I had not such power, whether, as the indictment originally stood, there was a fatal variance;

Secondly, whether the form of the complaint before the justices prevented the conviction of the prisoner under this indictment.

C. M. BLACKBURN.

No counsel was instructed for the prisoner.

*Collins*, for the prosecution. First, as to the power of the judge at the trial to amend. It is true that the judge had no power to make the amendment under the 9 Geo. 4, c. 15; but the words of the stat. 14 & 15 Vict. c. 100, s. 1, are sufficiently large to empower him to make it.

KELLY, C. B.—The variance in the description of the justices was immaterial to the merits of the case, and the judge had power to amend under 14 & 15 Vict. c. 100, s. 1.

*Collins*.—As to the other objection. The information was laid under the Game Act (9 Geo. 4, c. 69), when the warrant was applied for; and the objection is that it omits the word “there” after the words “did enter Quarry Close for the purpose of taking and destroying game.” The case of *Fletcher v. Oalthorpe* only decides that it is necessary in a conviction under this statute that it should appear that the person convicted entered the close for the purpose of taking game there, but there is no authority that an information or complaint in writing should be as precise.

LUSH, J.—The objection comes to this, that the justices had no jurisdiction to hear the complaint because of the omission.

*Collins*.—It was proved that the defendant was convicted before the justices of taking game in this close, and the case of *Fletcher v. Oalthorpe* does not support this objection.

KELLY, C. B.—The only question is whether the justices had jurisdiction to try this offence, and it is clear that they had.

The rest of the Court concurred.

*Conviction affirmed.*

REG.  
v.  
THOMAS  
WESTERN.

1868.

Pleading—  
Indictment—  
Amendment—  
Jurisdiction.

## COURT OF CRIMINAL APPEAL.

May 2, 1868.

(Before KELLY, C.B., KEATING, J., PIGOTT, B., M. SMITH, J.,  
and HANNEN, J.)

REG. v. BRACKENRIDGE AND KING.(a)

*Forgery—Engraving plate of a Scotch bank note—Jurisdiction.*

*It is an offence under the 24 & 25 Vict. c. 98, s. 16, feloniously, and without lawful excuse, to engrave upon a plate in England a note of a bank in Scotland, or in the Colonies.*

CASE reserved for the opinion of this Court by Mr. Justice M. Smith.

The two prisoners were tried and convicted at the Spring Assizes for Warwickshire, 1868, on an indictment which charged them with feloniously, and without lawful authority and excuse, engraving upon a plate part of a promissory note purporting to be a part of a bank note of the British Linen Company, carrying on the business of bankers, for the payment of 5*l.* contrary to the form of the statute, &c.: (see 24 & 25 Vict. c. 98, s. 16.)

The evidence showed that the prisoners had engraved upon a plate part of a bank note for 5*l.*, purporting to be a note of a Scotch banking company called the British Linen Company, and had made arrangements with a printer for printing a large number of notes from the plate, when engraved.

It was proved that the British Linen Company was a Scotch banking company carrying on the business of bankers at Edinburgh and at other places in Scotland, and not carrying on the business of bankers out of Scotland.

It was objected, on behalf of the prisoners, that they were not indictable under the stat. 24 & 25 Vict. c. 98, inasmuch as that act did not apply to the engraving, &c., of the plates of notes of Scotch banks, and sects. 19 and 55 of the act were referred to.

I reserved the point for the consideration of this Court.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



I passed on each of the prisoners sentence of penal servitude for eight years, but respited execution until the decision of this Court was obtained.

MONTAGUE SMITH.

REG.  
v.  
BRACKENRIDGE  
AND KING.

1868.

No counsel was instructed to argue for the prisoners.

*Overend*, Q.C. (*Beasley* with him), for the prosecution.—The conviction was under the 24 & 25 Vict. c. 98, s. 16, which enacts that “Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall engrave, or in any-wise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or to be a blank bank note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part of a bank note, promissory note, bank bill of exchange, or bank post bill of the Governor and Company of the Bank of England, or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company or person as aforesaid, or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the Governor and Company of the Bank of England or the Governor and Company of the Bank of Ireland or by any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, blank bill of exchange, or bank post bill, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or part of a bank note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription shall be made or printed, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not

Forgery—  
Scotch bank  
note—  
Jurisdiction.

REG.  
v.  
BRACKENRIDGE  
AND KING.

1868.

Forgery—  
Scotch bank  
note—  
Jurisdiction.

exceeding two years with or without hard labour, and with or without solitary confinement." The question is whether the words "or of any other body corporate, company or person carrying on the business of bankers," includes bankers in Scotland. In considering this point the 55th section must be regarded, which is: "Nothing in this act contained shall extend to Scotland, except as otherwise hereinbefore expressly provided." In the repealed statute (11 Geo. 4 & 1 Will. 4, c. 66, s. 29) there was a similar clause: "That that act should not extend to any offence committed in Scotland or Ireland." The same thing was meant in both these sections, though different words are used. The only section in the 24 & 25 Vict. c. 98, in which there is any express enactment referring to Scotland is the first, which relates to forging the Privy Seal. In *Reg. v. Hannon* (9 C. & P. 11), it was held that sect. 18 of 11 Geo. 4 & 1 Will. 4, c. 66, which is similar to sect. 16 of 24 & 25 Vict. c. 98, applied to a colonial bank, the bank of Canada. Unless the same construction is put on the 24 & 25 Vict. c. 98, s. 16, there will be no punishment to the forging of foreign or colonial notes in this country. Sect. 55 will be satisfied by construing it to mean that "nothing in this act contained shall extend to Scotland, except as hereinbefore provided, so far as procedure is concerned." *Reg. v. Keith* (1 Dears. 486) was also cited.

KELLY, C.B.—This case raises an important question; but we think that it is one free from doubt. The indictment is framed on the 24 & 25 Vict. c. 98, s. 16, and the point is whether the general words "or of any other body corporate, company, or person carrying on the business of bankers," coming after the specific words "Bank of England" and "Bank of Ireland" include a bank in Scotland or any of Her Majesty's colonies. They would include such a bank according to the literal construction of the words, there being no limitation or restriction in the section; but we think that such a bank is included upon the substantial meaning and actual intent of the statute. The only doubt that could be raised is by sect. 55, and it would have been a very serious one, if that section had been intended to exclude Scotland from the operation of the act, for it would then have left bankers in Scotland and the colonies without the protection that is extended to bankers in England and Ireland. Such could not have been the intention of the act. Sect. 55 means, as was expressed in sect. 29 of 11 Geo. 4 & 1 Will. 4, c. 66, that the act is not to extend to offences committed in Scotland. The Scotch mode of procedure is different to ours, and it was intended to exclude from the operation of the act offences committed in Scotland, and which were triable and punishable there. There is no special provision applicable to Scotland, and sect. 1, relating to the Privy Seal, is the only enactment in which there is any express provision applicable to Scotland, so that sect. 55 seems to have been introduced *ex majori cautelâ*.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

May 30, 1868.

(Before COOKBURN, C.J., MARTIN, B., WILLES, J., BRAMWELL, B.,  
and BLACKBURN, J.)

REG. v. MARY COHEN.(a)

*Baron and feme—Larceny—Wife not acting under control of her husband.*

*Husband and wife were jointly indicted for stealing. The husband was in the employ of the prosecutors, and was seen near the spot when the property stolen arrived at the prosecutor's. The next day the wife was seen near the spot where her husband was engaged on his work. She was at a place where there was no road, with a bundle concealed, and was followed home. On the following day she pledged the stolen property at two different places. At one of the places where she was not known she pledged in a false name :*

*Held, that upon this evidence the wife might be convicted of stealing the property.*

CASE reserved for the opinion of this Court at the General Quarter Sessions of the peace held at Preston, in and for the county palatine of Lancaster, the 8th of April, in the year of our Lord 1868.

This was an indictment against Mary Cohen and her husband for stealing cloth, the property of the Lancashire and Yorkshire Railway Company, and also for receiving the property aforesaid, knowing the same to have been stolen.

The case was tried before me at the Preston Easter Sessions, in the year of our Lord 1868. The husband pleaded guilty to stealing the cloth ; the wife not guilty generally.

The evidence was that the property in question had been forwarded from Halifax to Carlisle on the 8th of February, in the year of our Lord 1868, upon a certain truck which arrived undisturbed at the goods station at Preston, at 7 a.m., on the morning of Sunday, the 9th of February. When the said truck

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

REG.  
v.  
MARY COHEN.

1868.

Larceny—  
Husband and  
wife.

was unloaded at Preston, on the 10th of February, the property in question was missing.

The male prisoner was a pointsman in the service of the said company, and was on duty within two yards of the siding in which the goods train stopped on the mornings of the 9th and 10th of February. The female prisoner was seen on the afternoon of the said 10th of February within thirty yards of the place where her husband was on duty, and where he had a cabin for his accommodation, coming down the bank of the railway, in a place where there was no road, with a bundle concealed under her shawl. She was watched and followed to her husband's house. At 9 a.m. on the morning of the 10th of February Mary Cohen pledged part of the property aforesaid in her own name at a place where she was known. On the afternoon of the same day she pledged in a false name further part of the said property at a place where she was not known. The residue of the said property was afterwards found in her husband's house.

I directed the jury that if they thought that the woman was acting independently of her husband, and not under his control, and that she was engaged with him in stealing the goods, they might find her guilty of the theft.

The jury found Mary Cohen guilty.

The prisoner, Mary Cohen, was sentenced to six months' imprisonment with hard labour, and is at present confined in Lancaster Castle.

The question for the opinion of this Court is whether the prisoner, Mary Cohen, was rightly convicted upon this evidence.

C. R. LACSON,  
Chairman of the Second Court.

No counsel appeared to argue on either side.  
By the COURT:

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*May 30, 1868.*

(Before COCKBURN, C.J., MARTIN, B., WILLES, J., BRAMWELL, B.,  
and BLACKBURN, J.)

REG. v. WILLIAM RYLAND.(a)

*Carnal knowledge of a girl between ten and twelve—Indictment—  
Attempt.*

*Under an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, contrary to the statute, &c., the prisoner may be convicted of the attempt to commit that offence.*

CASE reserved for the opinion of this Court by the Recorder of Birmingham.

Borough of Birmingham, in the } The jurors for our Lady the  
county of Warwick, to wit. } Queen upon their oath present  
that William Ryland, on the 5th of January, 1868, in and upon  
one Mary Ann Thorn, a girl above the age of ten years and under  
the age of twelve years to wit, being in the eleventh year of her  
age in the peace of God, and our Lady the Queen then being,  
unlawfully did make an assault; and her, the said Mary Ann  
Thorn, did then unlawfully and carnally know and abuse against  
the form of the statute in such case made and provided, and  
against the peace of our Lady the Queen, her Crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Ryland afterwards to wit on the day and year aforesaid, in and upon the said Mary Ann Thorn, did make an assault, and her, the said Mary Ann Thorn, did then beat and illtreat and other wrongs to the said Mary Ann Thorn then did to the great damage of the said Mary Ann Thorn against the peace of our Lady the Queen, her Crown and dignity.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

REG.  
v.  
WILLIAM  
RYLAND.

1868.

*Attempt to  
have carnal  
knowledge—  
Indictment.*

This prisoner was tried before me at the last Quarter Sessions of the borough of Birmingham on the above indictment; and from the evidence of Mary Ann Thorn, a girl aged ten years and a few days, and of the surgeon, it was clear that the whole offence had not been completed, and the attention of the jury was directed to the attempt to commit the statutable misdemeanor. It was also clear that the child had made no resistance, and was not unwilling that the attempt should be made.

Mr. Dugdale, whom I had requested to watch the case on the part of the prisoner, thereupon objected, that as the child consented, the indictment which charged the assault could not be sustained, and that although it might be a misdemeanor at common law to attempt to commit the statutable misdemeanor of having carnal connection with a child between the ages of ten and twelve, yet that where the indictment was in the form set out above, it was impossible to sustain it, and that the averment of an assault could not be treated as surplusage; he cited *Reg. v. Martin* (2 Moo. C. C. R. 123) and *Reg. v. Johnson* (L. & C. 632).

On the part of the prosecution, it was contended that the averment of an assault was unnecessary and immaterial, and might be rejected as surplusage. Secondly, that the indictment was good as stating with sufficient preciseness the charge of committing the statutory misdemeanor of having carnal connection with a girl between the ages of ten and twelve, and that under such an indictment the prisoner could be found guilty of an attempt; and, thirdly, that the case of *Reg. v. Beale* (1 Law Rep. C. C. R. 39; 10 Cox Crim. Cas. 157) had materially weakened, if not overruled, the previous decisions.

I doubted whether the case of *Reg. v. Beale* had been intended by this Court to overrule the older judgments; but as there have been several charges of the same description lately in Birmingham, I left the case to the jury, who found that the prisoner did attempt to have carnal connection, and that the child consented.

I thereupon directed a verdict of guilty to be entered, and ordered the prisoner to remain in custody, he not being able to find bail.

I respectfully submit to this Court whether the conviction can be sustained or not.

ARTHUR R. ADAMS,  
Recorder of the Borough of Birmingham.

No counsel appeared to argue for the prisoner.

*Buzzard*, for the prosecution, was stopped by the Court.

By the COURT:

*Conviction affirmed.*



## COURT OF CRIMINAL APPEAL.

*May 30, 1868.*

(Before COCKBURN, C.J., MARTIN, B., WILLES, J., BRAMWELL, B.,  
and BLACKBURN, J.)

REG. v. GLYDE.<sup>(a)</sup>

*Larceny—Lost property.*

*A. dropped a sovereign on a country road during the night-time; she did not stop to look for it, but on the following morning she started to go to the spot in the hope of finding it. The prisoner picked it up, and said to his companion, "It would just make his week up;" they walked on and met A. on her way to the spot where she lost the sovereign. From what then passed between A. and the prisoner and his companion, the fact that the prisoner had got A.'s sovereign was brought to the prisoner's knowledge; but he denied having found it. Subsequently he was taxed with having done so; but he would not admit it, equivocated, and declined to give it up:*

*Held (on the authority of Thurborn's case), that the prisoner could not be convicted of larceny, as at the time the prisoner picked up the sovereign, although intending to appropriate it to his own use, he did not know, and had not the means of knowing, who the owner was.*

CASE reserved by Cockburn, C.J., for the opinion of this Court.

William Glyde was convicted at the last Assizes for the county of Sussex, on an indictment for larceny, in which he was charged with having stolen a sovereign, the property of Jane Austin.

It appeared that on the evening of the 16th of January last, the prosecutrix, being on her way from Robertsbridge, where she had been to pay some bills, to her home at Brightling, and having some money loose in her hand, had occasion, owing to the dirty state of a part of the road, to hold up her dress, and in doing so let fall a sovereign. It being then dark, she did not stop to look for the sovereign; but on the following morning she started to go to the spot, in the hope of finding the lost coin.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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In the mean time the prisoner, coming from Robertsbridge towards Brightling, in company with a man named Hilder and his son, and seeing, at the spot where the prosecutrix had dropped her sovereign, a sovereign lying in the road, picked it up, and put it in his pocket, observing that it was a good sovereign, and would just make his week up.

Proceeding onwards, the men soon afterwards met the prosecutrix, then on her way to the spot where the sovereign had been dropped. According to her statement, on meeting the men, she addressed Hilder, whom she knew, and asked, in the hearing of the prisoner, "if he had stumbled on a sovereign," stating that she had lost one, and was going to look for it; to which inquiry Hilder answered in the negative. She was, however, contradicted by Hilder and his son, who were called as witnesses for the prosecution, as to any such conversation having taken place. But it was clear that the fact of the sovereign thus picked up by the prisoner being one which had been lost by the prosecutrix, was speedily brought to the prisoner's knowledge. The fact of the prosecutrix having lost a sovereign, and of the prisoner having found one, having come to his master's ears, the master asked him if he had found a sovereign, to which he answered that he "was not bound to say." The master further asked if he had not heard that Mrs. Austin had lost one, to which the prisoner made the same reply. On the master asking whether it would not be more honest to give the sovereign up to her, he answered that "he could just manage to live without honesty."

Being asked by a police constable whether he remembered going up the Brightling road, and picking up a sovereign, he answered, "I don't know that I did." On the officer saying, "I have been informed by witnesses that you did so, and if you did so, it did not belong to you; more particularly as you know to whom it belonged." The prisoner said he did not want to have anything more to say to the officer, and went into his house. On a subsequent occasion, however, he admitted to the same witness that he had picked up the sovereign.

The witness Hilder also stated that the prisoner afterwards came to him and asked him if he could say that he (prisoner) had picked up a sovereign, and on receiving an answer in the affirmative, said that if that was so he must go and see the prosecutrix, who had applied to him several times about it.

In summing up to the jury on this state of facts, I told them that where property was cast away or abandoned, any one finding and taking it acquired a right to it, which would be good even as against the former owner, if the latter should be minded to resume it. But that when a thing was accidentally lost, the property was not divested, but remained in the owner who had lost it, and that such owner might recover it in an action against the finder. As to how far larceny might be committed by a person finding a thing accidentally lost, it depended on how far the party

finding believed that the thing found had been abandoned by its owner or not. That where the thing found was of no value, or of so small value that the finder was warranted in assuming that the owner had abandoned it, he would not be guilty of larceny in appropriating it; or if, not knowing, or not having the means of discovering the owner, the finder, from the inferior value of the thing found, might fairly infer that the owner would not take the trouble to come forward and assert his right, so that practically there would be an abandonment, and, so believing, appropriated the thing found, as virtually abandoned by the owner, he would not be guilty of larceny. So, although the value of the article might render it impossible, in the first instance, to presume abandonment by the owner; yet if from the fact of no owner coming forward within a sufficient time, the finder might reasonably infer that the owner had abandoned and given up the thing as lost, there would be no criminality in an appropriation of it by the latter.

On the other hand, I pointed out that there were things as to which it could not be supposed that they had been intentionally abandoned, or the owner be supposed to have given up his property; thus *e. g.* a purse of gold, or a pocket book containing bank notes found in the road, could not possibly be supposed to have been intentionally placed there; or a diamond ornament found outside the door of an assembly room, to have been intentionally dropped by the lady who had worn it; or a box or parcel left in a public conveyance or a hack cabriolet, to have been left with the intention of abandoning the property. That in all these cases, as the property remained in the owner, and the presumption of abandonment was plainly negatived by the circumstances, a person finding such an article and appropriating it to himself, with an intention of wronging the owner, if he knew who the owner was, or had the means of finding the owner—as where the name of and address of the owner were on the thing found—or had the means of ascertaining the owner, as in the case of a cabman who knew the house at which he had taken up or set down a person by whom an article must have been left in the carriage, would clearly be guilty of larceny. And even where the finder did not know the owner, if the nature of the thing found precluded the presumption of abandonment, and gave every reason to suppose that the owner would come forward and assert his claim, and the finder nevertheless determined to appropriate the chattel and to keep it, though he should afterwards become aware who the owner was—this too, if done with the intention of wrongfully depriving the unknown owner of property, which the finder knew still to belong to him, would be larceny, provided such intention was contemporaneous with the original taking of possession.

I told the jury that while, to constitute larceny in appropriating an article thus found, there must be a guilty intention of taking that which was known to belong to some one else, and which the party appropriating knew he had no right to treat as

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his own, this intention might be gathered from the value of the article and the other circumstances of the case, especially the conduct of the party accused, as to concealment or otherwise.

In this respect, I told them they might properly take into account the conduct of the prisoner Glyde in maintaining silence when he heard the question put by the prosecutrix to Hilder, if they believed that portion of her evidence; or, at all events, in refusing to say whether he had found a sovereign or not, and only acknowledging it when Hilder had told him he was prepared to speak to the fact.

As the result of this reasoning, I left it to the jury to say whether the prisoner, on finding the sovereign, believed it to have been accidentally lost, and nevertheless with a knowledge that he was doing wrong, at once determined to appropriate it to himself, and to keep it, notwithstanding it should afterwards become known to him who the owner was; and I told the jury if they were of that opinion to find the prisoner guilty. But, inasmuch as there was nothing to show that the prisoner, on appropriating the sovereign on finding it, had any reason to suppose that the owner would afterwards become known to him, or any belief that he would, I doubted whether an intention on his part of keeping it, even if the owner should become known to him—he not believing that the latter event would come to pass—would amount to larceny. I therefore thought it right to take the opinion of this Court, whether the conviction can be sustained on the facts I have stated.

The jury having found the prisoner guilty, I admitted him to bail, on his own recognisances to come up for judgment at the next Assizes, if required so to do. Had I passed sentence at the time, I should have condemned him to imprisonment and hard labour for one calendar month.

A. E. COCKBURN.

No counsel was instructed to argue for the prisoner.

*Lumley Smith*, for the prosecution.—The conviction was right. It appears from the evidence that the prisoner knew, shortly after he picked up the coin, who the owner of it was. This case differs from *Reg. v. Moore* (8 Cox Crim. Cas. 416; 1 L. & C. 1) in this fact, that in that case the jury found that the prisoner, at the time he picked up the bank note, believed that the owner could be found. In this case the original taking was not innocent; the prisoner's remark to his companion was evidence that he then intended to appropriate it to his own use. In *Reg. v. Preston* (5 Cox Crim. Cas. 390; 2 Den. & P. 353), the original taking was innocent, but there was a subsequent unlawful appropriation. The learned counsel then cited the observations of Wightman J. in *Reg. v. Moore* (30 L. J. 77, M. C.), and of Williams, J. in *Reg. v. Christopher* (8 Cox Crim. Cas. 91), quoted *infra* in the judgment of Martin B. The case of *Reg. v. Thurborn* (8 Cox Crim. Cas. 453) was then referred to; and the note at p. 180 of 2 Russ.

on Crimes (4th edit.) where the propriety of the decision in *Reg. v. Thurborn* is fully discussed.

COCKBURN, C.J.—I must say that my own opinion is, that this was a case of larceny. The question turns on this, how far would a person, under the circumstances, be justified in supposing that the lost property was abandoned by its owner? There may be cases in which the value is so large, that no one could suppose the property was intentionally abandoned, while there may be others in which a man might be justified in doubting whether the owner would come forward. If a man were to say, "I do not believe that the owner will come forward," it would not be a case of larceny; but if it is doubtful if the owner will come forward—if the loser were a poor man he might, if a rich man he might not—if there is ground for supposing that the property is not intentionally abandoned, and if the person finding it then says, "I will appropriate it to myself, notwithstanding the owner may come forward," I think that would amount to larceny. *Thurborn's* case, however, does not go that length. Here there was no evidence to show that, when the prisoner picked up the sovereign, he knew or had the means of knowing who the owner was, and although there was evidence that the prisoner intended, when he picked it up, to appropriate it to himself, there was nothing to show that he believed the owner would come forward, and, therefore, upon *Thurborn's* case, the conviction cannot stand. If the matter had been of greater amount, I should have liked the question to be discussed before the full Court, but as *Thurborn's* case is not overruled, the conviction must be quashed.

MARTIN, B.—I agree that the conviction should be quashed; but I own my impression is, that this is a case of larceny. If the prisoner, at the time he picked up the sovereign, intended to appropriate it to his own use, whether the owner might come back for it or not, I should have thought that he would be guilty of larceny. In *Reg. v. Christopher*, Williams, J., said that, "though agreeing with the decision in *Thurborn's* case, he must confess that he had never been able to agree with some of the principles there laid down." And in *Reg. v. Moore*, Wightman, J., said: "In *Reg. v. Thurborn* it is said, 'If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny.' But here the original taking is not innocent, for the jury have found that when the prisoner picked up the coin he intended to deprive the owner of it. Is there any case of a conviction held bad, in which these three ingredients have concurred: that the prisoner intended to appropriate the property from the first; that he believed, at the time he took it, the owner could be found, and acquired the knowledge of who that owner was before he converted it to his own use?" With respect to the present case, we are bound by the authority of *Reg. v. Thurborn*, and in order to render the finder of lost property guilty of larceny, he must know who the owner is, or have the means

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of knowing, although he intends from the first to appropriate it to his own use. I do not think that that is correct law, but I agree that it is not worth while to have this case argued before the full Court.

WILLES, J.—I agree that the conviction ought to be quashed. *Reg. v. Thurborn* is in point, and governs this case.

BRAMWELL, B.—I am of the same opinion.

BLACKBURN, J.—I am of the same opinion. *Reg. v. Thurborn* is in point; and I rather think that it takes the right view of the subject. In cases of bailment, the Legislature has interfered, and made a subsequent wrongful appropriation the subject of larceny, although the original taking was innocent. In the case of lost property, however, *Reg. v. Thurborn* has decided that if the finder appropriates it with the intent to take the entire dominion over it, and does know that the true owner can be found, it is larceny; but if he does not know, that it is not. Whilst that decision remains unreversed, it must be taken to be the law. In the present case there is not the slightest reason for saying that, at the time the prisoner picked up the coin, he could find out the true owner, or that he was under the impression that he could be found.

*Conviction quashed.*



## COURT OF CRIMINAL APPEAL.

*May 30, 1868.*

(Before COCKBURN, C.J., MARTIN and BRAMWELL, BB., and WILLES and BLACKBURN, JJ.)

REG. v. SHAW.(a)

*Lunatic—Receiving into an unlicensed house—8 & 9 Vict.  
c. 100, s. 90.*

*C. was placed in the house of a medical man as an invalid; the house not being licensed or registered for the reception of lunatic patients. C.'s mind was quite imbecile, from natural causes, aggravated by intemperance, and he allowed himself to be kept in a state of revolting filthiness; but it did not appear that he laboured under any delusion or mental aberration, nor was he subject to fits of frenzy or violence:*

*Held, that C. was a lunatic within the meaning of 8 & 9 Vict. c. 100, s. 90, and that the medical man was liable to the charge of receiving C. to board and lodge in an unlicensed house.*

CASE reserved by Cockburn, C.J., for the opinion of this Court.

Edward Charles Shaw was convicted at the last Spring Assizes for the county of Hertford on an indictment under stat. 8 & 9 Vict. c. 100, s. 90(b), charging him with having

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The 8 & 9 Vict. c. 100, s. 90 enacts: "That no person (unless he be a person who derives no profit from the charge, or a committee appointed by the Lord Chancellor) shall receive to board or lodge in any house other than an hospital registered under this act, or an asylum or house licensed under this act, or under one of the acts hereinbefore repealed, or take the care or charge of any one patient as a lunatic or alleged lunatic, without the like order and medical certificates in respect of such patient as are hereinbefore required on the reception of a patient (not being a pauper) into a licensed house; and that every person (except a person deriving no profit from the charge or a committee appointed by the Lord Chancellor) who shall receive to board or lodge in any unlicensed house not being a registered hospital or an asylum, or take the care or charge of any one patient as a lunatic, or alleged lunatic, shall within seven clear days after so receiving or taking such patient transmit to the secretary of the commissioners a true and perfect copy of the order and medical certificates on which such patient has been so received, and a statement of the date of such reception, and of the situation of the house into which such patient has been received, and of the Christian and surname and occupation of the occupier thereof, and of the person by whom the

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taken charge of and received to board and lodge, in a house not being a duly registered hospital or licensed asylum, one John Clode, a lunatic or alleged lunatic; and also with having done so without the other conditions and formalities required by the statute having been complied with.

All the facts necessary to support the indictment (assuming the said John Clode to have been a lunatic) were fully established; but a question arose whether the said John Clode was a lunatic within the meaning of the act; the term lunatic being by the interpretation clause declared to mean "every insane person, and every person being an idiot or lunatic, or of unsound mind."

It appeared that Mr. Clode, a man of fifty-five years of age, having had, after indulging for some time in habits of intemperance, three attacks of paralysis, had been placed with the defendant, a medical man, not as a lunatic but as an invalid, whose memory had become greatly impaired by bodily weakness and infirmity. It did not appear that he laboured under any delusions or mental aberration; neither was he subject to fits of frenzy or violence. But it was clear that his mental faculties had fallen into a state of exceeding weakness and imbecility, as will appear from the following facts.

He was insensible to the calls of nature, and utterly regardless of all cleanliness, and was satisfied to remain in a most revolting state of filthiness.

It appeared that he had been visited by order of the Lord Chancellor by two physicians, Drs. Blandford and Bennett; thrice by the former, once by the latter.

Dr. Blandford proved that on visiting defendant's establishment on the 31st of October last, he found Mr. Clode, at between 6 and 6.30 p.m., in bed, in a room about 12ft. square and 6½ft. high. He was lying on the remains of two old mattresses covered over with a piece of old carpet, with no other bedclothes whatever, and without pillow or bolster.

care and charge of such patient has been taken. And every such patient shall at least once in every two weeks be visited by a physician, surgeon, or apothecary, not deriving and not having a partner, father, son, or brother, who derives any profit from the care or charge of such patient, and such physician, surgeon, or apothecary, shall enter in a book to be kept at the house or hospital for that purpose to be called "the medical visitation book," the date of each of his visits, and a statement of the condition of the patient's health both mental and bodily, and of the condition of the house in which such patient is, and such book shall be produced to the visiting commissioner on every visit, and shall be signed by him as having been so produced, and the person by whom the care or charge of such patient has been taken, or into whose house he has been received as aforesaid shall transmit to the secretary of the commissioners the same notices and statements of the death, removal, escape, and recapture of such lunatic, and within the same periods as are hereinbefore required in the case of the death, removal, escape, and recapture of a patient (not being a pauper) received into a licensed house, and that every person who shall receive into an unlicensed house not being a registered hospital nor an asylum, or take the care or charge of any person therein as a lunatic without first having such order and medical certificates as aforesaid, or who having received any such patient shall not within the several periods aforesaid transmit to the secretary of the commissioners such copy, statement, and notices as aforesaid, or shall fail to cause such patient to be so visited by a medical attendant as aforesaid, and every such medical attendant who shall make an untrue entry in the said medical visitation book shall be guilty of a misdemeanor."

The mattresses, one of which was of flock, the other of straw, were soaked with fæces and urine, which was dripping through on to the floor, and were quite rotten. The walls of the room were filthy, having marks of fingers dirty with fæces having been smeared on them; as was also the case with a post which supported the ceiling. The smell in the room was, to use the words of the witness, "most abominable." The room was without carpet of any sort. There was an old washstand with a basin and jug, but no water, soap, or towel. Not far from the bedstead was a heap of ashes, and on it two chamber utensils, one full of fæces. Mr. Clode's trousers were wet with urine, and a pair of drawers lying there were dirty with fæces. He was lying in a flannel shirt, the tail of which was gone. He was very wet with filth, as was the piece of carpet with which he had been covered.

Emma Coughtree, a witness, proved that since the month of May, she had been employed to clean out Mr. Clode's room once a week. That his bed consisted of two rotten mattresses and a piece of old carpet and an old coat. There were no sheets or blankets. She stated that, on first going there, she had to remove a pail, as well as two chamber utensils, full of excrement, which was all flowing over on to the floor, while under the bed there was "quite a pond drained from the mattresses."

It appeared that, after the first visit of Dr. Blandford, a slight improvement in the attention to the comforts of Mr. Clode took place. According to the evidence of the witness Emma Coughtree, on the 1st of November the two old mattresses were removed, and carried to a dunghill, having fallen to pieces from rottenness in the course of removal. A straw bed and palliasse were substituted, and two straw pillows supplied.

On November 25, which was after the improvement just referred to had taken place, Mr. Clode was visited by Dr. Bennett. This witness stated that, having desired to see Mr. Clode's room, he was conducted to it by the defendant; but on entering the room the stench was so intolerable that he proceeded no farther. Nevertheless, he saw Mr. Clode's bed, which he described as having a very miserable dirty-looking mattress on it. The room also looked miserable and dirty. Chloride of lime had evidently recently been used, but though the smell of it was very strong, it was not sufficient to overpower the stench of the room.

It appeared that Mr. Clode was not dissatisfied with, and was probably insensible to, the disgusting state in which he was thus suffered to remain. He, indeed, said, in answer to a question from Dr. Blandford how he came to be in such a room, that it was in a very disgraceful state; but on being asked by Dr. Bennett on going to his apartment, whether he liked his room, he answered "yes;" and on being asked whether he was comfortable in it, answered "oh, very comfortable," and on being further asked whether his bed was comfortable, his answer was "oh, very."

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This insensibility to filth in so revolting a form was strongly insisted upon by the two medical witnesses for the prosecution as a marked indication of the utter decay of the intellectual faculties of the patient. But there was also striking proof that Mr. Clode's mental faculties in general, and more especially his memory, had become very seriously impaired. According to the evidence of the medical witnesses, it was extremely difficult to fix his attention on any subject, or to get him to converse. "He did not seem," says Dr. Bennett, "to take interest in anything," and he only gave "monosyllabic answers." He remembered, however, that he had lived in Park-street, Windsor, and, in his interview with Dr. Blandford, kept saying "I am John Clode of Windsor," in a silly way. He remembered, says Dr. Bennett, that he had taken part in elections for Windsor, but could not remember the names of the candidates, or on which side he had acted. On being asked if he had any family, he remembered he had a wife, and a daughter married, but on no occasion of his being visited by the medical witnesses could he remember, though frequently asked, the name of his daughter. Neither could he remember the name of the people with whom he was then living. When asked on each occasion how long he had been where he then was, his answer was "five months," though in fact he had been there as many years. This mistake he made twice during the same interview, though corrected by the defendant, who refused after the first interview with Dr. Blandford to allow the patient to be seen alone. When asked, on more than one occasion, why he remained at the defendant's his answer was "that he intended to leave next week, when the railway would be open."

Both Dr. Blandford and Dr. Bennett declared their positive opinion that there was decided unsoundness of mind in Mr. Clode in respect of the general decay of mental power, as well as of loss of memory and insensibility to the ordinary instinctive repugnance to filth. They agreed that there was an absence of active *dementia* or morbid delusion, and ascribed the existing symptoms to a decay of the intellectual and moral faculties, whether proceeding from paralysis, softening of the brain, or any other cause from which such decay could arise.

Two medical witnesses, called on behalf of the defendant, stated that there were no symptoms of insanity in Mr. Clode, and had given certificates to that effect; but one of them admitted that there was unsoundness of mind in respect of loss of memory arising from softening of the brain.

I directed the jury, if they believed the evidence for the prosecution, to find the defendant guilty, which they accordingly did; and looking on the case as an aggravated one in consequence of the neglect with which the patient had been treated, more especially as the defendant had insisted on having his pay doubled in consideration of extra comforts to be afforded, I sentenced the defendant to a fine of 100*l.* and six months'

imprisonment; but deeming it worthy of consideration whether imbecility and loss of mental power, arising either from natural decay, or from paralysis, softening of the brain, or other supervening cause, if unaccompanied by frenzy or delusion of any kind, constituted unsoundness of mind, so as to be lunacy within the meaning of the act on which this indictment was framed, I reserved that question for the decision of this Court.

If the Court shall be of opinion that John Clode was a lunatic within the meaning of the 90th section of the 8 & 9 Vict. c. 100, the verdict is to stand; otherwise not.

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. *Woollett*, for the prisoner.—It is submitted that the conviction was wrong. The question is, whether John Clode was a lunatic within the meaning of the word “lunatic” in sect. 90. As defined by the interpretation clause, sect. 114, “Lunatic shall mean every insane person, and every person being an idiot, or lunatic, or of unsound mind.” In this case Clode was received into Dr. Shaw’s house as an invalid, and he was treated as such, for there was evidence that he was suffering from a complaint in the lower part of his body. [COCKBURN, C.J.—There was some slight evidence as to that, only however relating to the urinary functions.] No restraint was put upon Clode as to liberty of egress and regress from and to the house. Clode was not a lunatic in the ordinary sense of the word. [COCKBURN, C.J.—Unsoundness of mind, which is one of the meanings of the term in the interpretation clause, seems to go further than the ordinary meaning of the word “lunatic.” Here the patient’s mind was in a state of imbecility caused by physical decay. BRAMWELL, B.—Would a will made by him in this state of mind be good?] I should say “Yes.” But I contend that it must be proved that Clode was kept and detained by Dr. Shaw as a lunatic in order to make him criminally responsible. [BRAMWELL, B.—If Clode was of unsound mind, the way in which Dr. Shaw kept him was evidence that he kept him as a lunatic, and not as a person of sound mind. COCKBURN, C.J.—Would any man have allowed himself to remain in the condition in which Clode was, if he had been of sound mind? BRAMWELL, B.—You surely do not intend to argue that if a man is a lunatic, and his friends take him to an asylum, and say to the person who keeps it, “Keep this man as an invalid,” the keeper does not take charge of a lunatic?] The question is, whether in such cases there is sufficient knowledge that the person received is a lunatic of unsound mind, and it is necessary to show affirmatively that the person charged had such knowledge. There are many cases on record in which servants and others have been kept and detained in such a filthy and improper state, and have allowed themselves to be so treated, and yet it was never contended that they were lunatics, though persons of weak intellect. [COCKBURN, C.J.—In this case all the facts were known to the defendant, which lead to the conclusion that Clode was a person

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of unsound mind. Although there was no frensy, or delusion, or other usual indications of insanity, yet there was inherent unsoundness of mind from natural causes, which had been aggravated by prior intemperance.] It is necessary to complete the offence created by the statute that the patient should be detained as a "lunatic;" but there was no evidence of that, and the utmost proved in the case was what might result from mere physical infirmity.

*Parry*, Serjt. (*Poland* with him), for the prosecution, was not called upon to argue.

COCKBURN, C.J.—We are all agreed that this conviction ought to stand, for the reasons stated during the argument. This case is clearly within the mischief intended to be provided against by the act. The state of imbecility in which this person was found amounts to unsoundness of mind within the meaning of the act.

MARTIN, B.—This was unsoundness of mind analogous to idiocy.

The rest of the Court concurred.

*Conviction affirmed.*



## COURT OF CRIMINAL APPEAL.

*January 18, 1868.*

(Before COCKBURN, C.J., KEATING, J., SHEE, J., PIGOTT, B., and  
M. SMITH, J.)

REG. v. JAMES DOWNEY.(a)

*False pretences—Obtaining value for notes of a bank that has  
stopped payment—Bankruptcy.*

*The defendant, knowing that some old country bank notes had been  
taken by his uncle forty years before, and that the bank had  
stopped payment, gave them to a man to pass, telling him to  
say, if asked about them, that he had taken them from a man  
he did not know. The man passed the notes, and defendant  
obtained value for them. It appeared that the bankers were  
made bankrupt:*

*Held, that the defendant was guilty of obtaining money by false  
pretences:*

*Held, also, that the bankruptcy proceedings need not be proved.*

CASE reserved for the opinion of this Court.

The defendant was indicted at the Epiphany Quarter Sessions of the peace of the North Riding of Yorkshire, for obtaining money and goods by false pretences, with intent to defraud.

The first count of the indictment stated that the defendant falsely pretended to one John Beal that a piece of paper was a bank note then current and good, and available for the sum of 5*l.*, and of the full value of 5*l.*, by which false pretence the defendant then unlawfully obtained from the said John Beal the sum of 5*l.* with intent to defraud, whereas, in fact, the said piece of paper was not a bank note then current or good, or of the full value of 5*l.*, as the defendant then well knew.

The second count stated that the defendant falsely pretended to the said John Beal that there was then in existence a banking co-partnership of persons carrying on business as bankers under the name of the Stockton and Cleveland Bank, and that a piece

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of paper purporting to be a bank note of the Stockton and Cleveland Bank for the payment of 5*l.*, was then of value, by which false pretence the defendant then unlawfully obtained from the said John Beal 5*l.* with intent to defraud, whereas in fact there was not any banking co-partnership then carrying on business as bankers under the name of the Stockton and Cleveland Bank, nor was the said piece of paper of any value whatever, as the defendant well knew.

The fifth count stated that the defendant falsely pretended to one Walter Grimshaw that a piece of paper was a bank note then current and good, and available for 5*l.*, and then of the value of 5*l.*, by which false pretence the defendant then unlawfully obtained from the said Walter Grimshaw a boy's coat and a pair of leather leggings and 4*l.* 7*s.* with intent to defraud, whereas in fact the said piece of paper was not a bank note then current or good, or of the value of 5*l.*, as the defendant then well knew.

The sixth count stated that the defendant falsely pretended to the said Walter Grimshaw that there was then in existence a banking co-partnership carrying on business as bankers under the name of the Stockton and Cleveland Bank, and that a piece of paper purporting to be a bank note of the Stockton and Cleveland Bank for the payment of 5*l.* was then of value, by which false pretence the defendant then unlawfully obtained from the said Walter Grimshaw a boy's coat and a pair of leather leggings and 4*l.* 7*s.* in money, with intent to defraud, whereas in fact there was not any banking co-partnership then carrying on business as bankers under the name of the Stockton and Cleveland Bank, nor was the said piece of paper of any value whatever, as the defendant well knew.

It was proved that the defendant on the 24th of October last obtained through one Hansill, from John Beal, a butcher, at Whitby, 5*l.* in gold in exchange for a piece of paper, purporting to be a 5*l.* note of the Stockton and Cleveland Bank; and that on the same day he made a small purchase through Hansill, to the amount of 13*s.*, of Walter Grimshaw, a shopkeeper, at Whitby, paying for the same with another piece of paper, purporting to be a 5*l.* note of the same bank, receiving from Grimshaw the articles purchased and 4*l.* 7*s.* in exchange.

The defendant told Hansill to be sure if any one asked about the notes to say that he (Hansill) got them from a man he did not know. The defendant was taken into custody a few days afterwards in his own house, when a similar note was found in his pocket, seven others inside his trousers, and one in his boot, all of which were produced; and when charged with obtaining money under false pretence the defendant said, "The notes were mucky old things, which the old man (meaning his uncle) had taken in payment of a dairy of cheeses at Yarm fair forty years ago, and that the bank had stopped payment directly after."

It was also proved by John Heavisides, a printer at Stockton-

on-Tees, that a bank called the Stockton and Cleveland Bank, had formerly existed in that town, but had stopped payment about forty years ago, and had never reopened, and was not now in existence. On cross-examination by the defendant's counsel, this witness stated that he knew the partners in the bank were made bankrupts; that he was employed by the Bankruptcy Commissioners to print in their presence the indorsements on the back of the notes of their having been produced and exhibited to the commissioners, without which no holder of a note could get a dividend. The notes produced bore this indorsement, but the witness did not know what dividend was paid.

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The defendant's counsel then made the following objection in writing :

"It being proved that the partners of the bank became bankrupt, I object that none of the bankruptcy proceedings being produced, there is no evidence that the notes are not of the value of 5*l.*, and no evidence that there are no assets to pay the notes in full, and therefore that there is no case for the jury."

I told the jury that there was no evidence that the notes were of no value, but that if on the evidence they believed the defendant to have passed the notes as good notes of an existing bank of the value of 5*l.*, knowing that the bank was insolvent, and had stopped payment forty years ago, and had not reopened, and that the notes were not of the value of 5*l.*, they might find him guilty.

The defendant was found guilty, and the Court had no reason to be dissatisfied with that verdict.

At the request of the defendant's counsel, this case was granted for the opinion of this Court whether the defendant was properly convicted or not.

The defendant was admitted to bail to appear at the next Quarter Sessions of the North Riding of Yorkshire to receive judgment.

ROBINSON FOWLER,  
Presiding Chairman.

*S. Shepherd*, for the prisoner.—The conviction was wrong. There was no evidence that the defendant made any one of the pretences alleged in the indictment. The mere sending of the note to be cashed did not amount to a false pretence. [COCKBURN, C.J.—The defendant dealt with the note as the note of a valid, subsisting bank, and sent it as a good note to be changed. That is a false pretence. KEATING, J.—And told the man he sent for change to say, if asked about the notes, that he got them from a man he did not know.] If that is the opinion of the Court, then the objection that the bankruptcy proceedings were not produced will be relied on. [COCKBURN, C.J.—The bankruptcy proceedings were quite immaterial. The proof of the

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false pretence was sufficiently made out by evidence that defendant passed the notes of an existing, solvent firm, whereas the firm was an insolvent or bankrupt one. The proceedings in the Bankruptcy Court were not absolutely necessary to show that.] The indorsement on the back of the note showed that it had been exhibited in the bankruptcy proceedings. As they were not produced there was no evidence here that the estate might not pay 20s. in the pound, or whether any dividend had been paid. Dividends may still be due on the note for anything that appeared at the trial. In *Rex v. Clark* (2 Russ. on Crimes, 634), where the prisoner obtained a bull by passing a promissory note of a firm that had ceased business twenty years previously, and had become bankrupts, a similar objection was taken that the proceedings in bankruptcy against the firm were not produced. [KEATING, J.—In *Rex v. Clark*, the prisoner was acquitted because there was no evidence that he knew the note to be false. M. SMITH, J.—Here the defendant knew that the notes had been in his uncle's possession forty years.] The following cases were then cited:—*Reg. v. Williams*, 7 Cox Crim. Cas. 351; *Reg. v. Flint*, Russ. & Ry. 460; *Reg. v. Evans*, Bell's C. C. 187; 8 Cox Crim. Cas. 257; *Reg. v. Spencer*, 3 Cor. & P. 420.

*Alfred Simpson*, for the prosecution, was not called upon.

COCKBURN, C.J.—This is a plain case, and free from all doubt. The defendant, knowing that his uncle had taken the notes forty years back, and that the bank had stopped payment directly after, passed them off as the notes of an existing solvent bank, and as notes of present value, and obtained value for them. This was clearly obtaining money by false pretences. All my brethren are of this opinion, and the conviction must be affirmed.

✓ The other Judges concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

January 18, 1868.

(Before COCKBURN, C.J., KEATING, J., SHEE, J., PIGOTT, B., and  
M. SMITH, J.)

REG. v. BENJAMIN SHEPHERD.(a)

*Malicious injury to trees—Damage exceeding 5l.—24 & 25 Vict.  
c. 95, s. 32.*

*Under the 24 & 25 Vict. c. 95, s. 32, which makes it an indictable offence to steal, or cut, &c., or damage any tree, &c., where the value of the articles stolen, or the injury done, shall exceed 5l., the respective values of several trees, or of the damage thereto, may be added to make up the 5l., in case the trees were cut down, or the damage done as part of one continuous transaction.*

CASE reserved for the opinion of this Court at the General Quarter Sessions of the peace of our Lady the Queen, held at Exeter, for the county of Devon, on Tuesday, the 2nd of July, in the year of our Lord, 1867, before Sir John Thomas Buller Duckworth, Bart., Biggs Andrews, Esq., and others their companions Justices.

The indictment consisted of three counts :

The first, under the stat. 24 & 25 Vict. c. 96, s. 32, charged the prisoner with stealing eight oak trees, of a value exceeding 5l., the property of the Right Hon. William Wells, Viscount Sidmouth, growing on lands of the said Viscount Sidmouth, in the parish of Upottery, in the county of Devon.

The second count, under the same statute and section, charged the prisoner with cutting with intent to steal these eight trees, growing elsewhere than in a park, pleasure ground, orchard, or avenue, or any ground adjoining, or belonging to any dwelling-house, thereby then doing injury to the said Viscount Sidmouth to an amount exceeding the sum of 5l.

The third count charged a larceny of the trees.

The charge of larceny was abandoned by the prosecution as the trees had not been removed.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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It was proved in evidence that a sale of standing timber, the property of Viscount Sidmouth, to the number of 261 oak trees, had taken place by auction on the 5th of February, 1867, and the trees had been purchased by three persons, one of whom, Mr. Heath, purchased forty-nine trees, marked, for the purposes of the sale, with the numbers 73 to 120 inclusive, and 261. These trees were all standing on Aller Chapplehayes and Bucketshayes farms in Upottery. They were not grouped together, but were for the most part standing in hedges on these farms at various distances from one another. Mr. Heath employed the prisoner, who was a carpenter and accustomed to the work, to fell and bark these trees in the usual way. The prisoner engaged about five men to assist him in the work. None of the trees included in the sale were the subject of the indictment, but eight other trees not marked for sale or sold. The evidence showed that the felling and ripping of the trees bought by Mr. Heath took place during the ripping season of 1867, which extended over the month of May, and that during that time the eight trees in question were felled, stripped of bark, and had their tops cut off.

There was evidence to connect the prisoner with the felling of these trees, but there was no evidence to show the precise day or days on which these trees or any of them were felled, or on how many days the prisoner and his assistants were engaged in the work, but it was proved that the work was commenced and steadily prosecuted without intermission, until the whole number of trees which the prisoner had been employed to throw were thrown, and it was then found that the eight trees in question had also been felled, and were lying on the ground.

The bark and tops of these eight trees had been removed and sold by the prisoner, and he offered the trees themselves for sale as they lay on the ground after the bark and tops had been removed from them.

The injury resulting from the cutting down of these trees did not amount in the case of any one tree to 5*l.* The value of the eight trees with their tops and bark amounted altogether to 24*l.* 15*s.* 9*d.*

The evidence on the point of value and situation of the trees was as follows: one tree (worth 3*l.*, tops and bark 1*l.*, total value 4*l.*), stood in a field called "Wood Close;" another (worth 3*l.*, tops and bark 1*l.*, total value 4*l.*), stood in a hedge between this field and "Wood Close Meadow;" one tree (worth 2*l.* 10*s.*, bark 10*s.* 6*d.*, total value 3*l.* 0*s.* 6*d.*), stood between the bottom of "Yellow Close" and a field called "Chapplehayes Six Acres;" another (worth 1*l.* 15*s.*; no evidence as to the value of the bark and top of this tree was given), stood two fields off "Chapplehayes Six Acres;" one, numbered seventy-one (worth 3*l.*, bark and top 1*l.* 0*s.* 9*d.*, total 4*l.* 0*s.* 9*d.*), and another, numbered seventy-two (worth 2*l.*, bark and top 14*s.*, total value 2*l.* 14*s.*), stood in the same hedge, between "Chapplehayes Six Acres" and "Bucketshayes Farm;" and another (worth 1*l.* 15*s.*, bark 10*s.* 6*d.*, total



value 2*l.* 5*s.* 6*d.*), stood between "Yellow Close" above mentioned, and "Chapplehayes-lane;" the eighth tree (worth 2*l.*, bark and top 1*l.*, total value 3*l.*), stood on the edge of a marl pit in "Chapplehayes Moor," but, beyond the name "Chapplehayes," there was no evidence of the contiguity or proximity of this last mentioned marl pit to any of the before-mentioned situations of the other seven trees.

At the close of the case for the prosecution, the prisoner's counsel objected that there was no evidence to go to the jury, that the prisoner at any one time cut any trees, thereby doing injury to an amount exceeding 5*l.*

The Court overruled the objection, and left the case to the jury, directing them that in order to convict the prisoner, they must be satisfied that he cut down at one time or so continuously as to form one transaction, such a number of the trees as would make the injury done, amount to a sum exceeding 5*l.*

The jury found the prisoner guilty, and he was sentenced to nine months' imprisonment with hard labour; but at the request of the prisoner's counsel, the Court reserved the point, and the prisoner was discharged on bail, to surrender in execution when called upon by the Clerk of the Peace for the time being.

The question for this Court is, whether there was any evidence to go to the jury, to show that injury amounting in the aggregate to a sum exceeding 5*l.*, was done, by feloniously cutting trees so continuously as to constitute the offence charged in the second count of the indictment.

If the Court should be of opinion that there was any such evidence the conviction will be affirmed, if not the conviction will be quashed.

J. T. B. DUCKWORTH,  
Chairman.

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24 & 25 Vict. c. 96, s. 32: "Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house shall (in case the value of article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound), be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall steal or shall cut, break, root up, or otherwise destroy or damage with intent to steal the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny."

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No counsel was instructed to argue for the prisoner.

*Mortimer*, for the prosecution.—The conviction was right. It is found that the prisoner cut down at one time, or so continuously as to form one transaction, such a number of trees as would make the injury done exceed 5*l.* There was evidence to support this finding, for the case shows that two trees, Nos. 71 and 72, exceeding in value 5*l.*, stood so near together in the same hedgerow, that it may reasonably be presumed that they were cut down at one continuous time. Then the value of the injury to each of the two trees may be added so as to make up the statutable limit of 5*l.*

The following cases were referred to :—*Reg. v. Hodges*, Moo. & M. 341; *Reg. v. Whiteman*, 6 Cox Crim. Cas. 370; 23 L. J. 120, M. C.

COCKBURN, C.J.—At first I had a doubt as to whether there was any evidence that the trees had been cut down at one continuous time, but that doubt has been removed by a more careful examination of the facts of the case. There was evidence as to two trees which might have been cut down in one continuous transaction. Then the question arises whether under sect. 32 the value of the two trees can be added together so as to make the amount of 5*l.* fixed by the section? Though it is to be regretted that there is some ambiguity in the language of the section, upon the whole I have come to the conclusion that the value of the two trees may be added to make up the amount of 5*l.* The first part of the enactment speaks of “the whole or any part of any tree” in the singular, but the after part says, “in case the value of the article or articles” (plural) “or the amount of injury done,” shall exceed the sum of 5*l.* “The amount of injury done” must be read with reference to “article or articles.” The words “article or articles” also refer to “any underwood” in the previous part of the section. And it would be unreasonable to suppose that the Legislature intended to protect “underwood,” and not to protect growing timber. Therefore I think that we must construe the enactment to mean where the injury to any one or more trees shall exceed the value of 5*l.* All my learned brothers are of the same opinion.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

January 18, 1868.

(Before COCKBURN, C.J., KEATING, J., SHEE, J., PIGOTT, B., and  
M. SMITH, J.)

REG. v. PETER KEENA.(a)

*Embezzlement—Cheque—Indictment—24 & 25 Vict. c. 96, ss. 67, 68.*

*An indictment for embezzling money under sects. 67 and 68 of 24 & 25 Vict. c. 96 is not proved by showing merely that the prisoner embezzled a cheque, without evidence that it had been converted into money.*

CASE reserved for the opinion of this Court.

Peter Keena was tried before me at the Michaelmas adjourned Quarter Sessions held at Bradford for the West Riding of the county of York on the 4th of December, 1867, charged in the first count of the indictment with embezzling on the 18th of September, at the parish of Dewsbury, certain money to the amount of 4*l.* 14*s.*, the property of Andrew Hirst, his master.

The second count charged him with embezzling on the 16th of October, at the parish aforesaid, certain other money, to wit, to the amount of 16*l.* 14*s.*, the property of the said Andrew Hirst, his said master.

No proof was given of the payment of 4*l.* 14*s.* to the prisoner in the first count mentioned, and that count was abandoned; but proof was given of payment to the prisoner of 16*l.* 14*s.* in the second count mentioned by a cheque for that amount; but no evidence was given that the cheque had ever been presented or cashed.

It was proved that in August last the prisoner sold goods on behalf of the prosecutor for 16*l.* 14*s.* to James Fenton, and that it was prisoner's duty to pay over all moneys he received to his master on the same day.

James Fenton proved that prisoner came to him on the 11th of October for payment of the above 16*l.* 14*s.*, and that he (Fenton)

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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paid prisoner the 16l. 14s. by cheque, whereupon prisoner gave a receipt in these words, "Settled 16th Oct. 1867. Peter Keena."

Receipt was produced and not disputed.

Fenton had not received any notice of the dishonour of the cheque.

A. Millet, superintendent of police, proved apprehending prisoner on the 29th of October, at Liverpool, on board a vessel bound for America; and prisoner, upon being charged with embezzling money, property of his master, said, "It's all right, I intended to send him the money when I got to America."

The prisoner's counsel contended that there was no evidence to support the indictment; that payment by cheque was not a payment in money as stated in the indictment; that the cheque might have been lost and never presented, or it might have been that James Fenton had no balance at the bank.

I held that the cheque was money, and directed the jury to take the law from me; that receipt of the cheque was receipt of the money.

The jury convicted the prisoner, and he was sentenced to be imprisoned in the House of Correction at Wakefield for six calendar months, subject to a case for the opinion of this Court on the above point.

WILLIAM POLLARD, Chairman.

No counsel appeared to argue the case on either side; but *Campbell Foster*, who was counsel for the prisoner at the sessions, informed the Court that the prisoner's statement to the policeman that "It is all right, I intended to send him the money when I got to America," had reference to the charge in the first count, which was abandoned.

COCKBURN, C.J.—The question is, what is the proper construction of sect. 71 of 24 & 25 Vict. c. 76. I think the meaning is that if a servant receives a cheque for his master, and fraudulently appropriates it to his own use and converts it into cash, it is sufficient to allege and prove that he either embezzled the cheque or the money; but if it is alleged that he embezzled money it must be proved that the cheque was cashed. The prisoner might have been indicted for embezzling the cheque, and then it would have been sufficient to prove that he had received the cheque and feloniously appropriated it to his own use; but here he is indicted for embezzling money, and it was not sufficient to show that he had received a cheque; it ought further to have been proved that he converted that cheque into money. It may be open to a reasonable doubt whether the prisoner did not go off with the cheque without having an opportunity of cashing it, or applying it to his own use. The only evidence was that the prisoner had received the cheque and gone off with it, which is not a sufficient proof of a charge of embezzling money.

KEATINGE, J.—The direction of the Chairman, that the cheque

was money, and that the jury were to take that as the law, is wrong.

PIGOTT, B.—I entertain some doubt whether the Legislature did not intend that the description of money in the indictment should be sufficient whether the embezzlement in fact was of money or a cheque.

SHEE, J.—There was a misdescription in the indictment in calling this cheque money.

M. SMITH, J.—Proof that the prisoner embezzled a cheque does not satisfy the allegation in the indictment that the prisoner embezzled money. If it had been proved that the prisoner received any money on account of the cheque it would have been different.

*Conviction quashed.*

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## COURT OF CRIMINAL APPEAL.

*January 25, 1868.*

(Before COCKBURN, C.J., KEATING, J., PIGOTT, B., SHEE J., and M. SMITH, J.)

REG. v. GEORGE BULLOCK.(a)

*Wounding—Animals—24 & 25 Vict. c. 97, s. 40—Construction.*

*Under the 24 & 25 Vict. c. 97, s. 40, which makes it an offence to kill, maim, or wound an animal, it is not necessary that the wounding should be done with an instrument; if done with manual power it is sufficient.*

CASE reserved for the consideration of this Court.

At the General Quarter Sessions of the peace for the county of Gloucester, holden on the 1st of January, 1868, George Bullock was tried before me on an indictment which charged him with maliciously and feloniously wounding a gelding, the property of James Ricketts.

The prisoner pleaded not guilty.

On the trial it was proved that the prisoner, who was sent by his master with a cart and horse to fetch stone from a distant field

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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on the 20th of December last, at 1.30 p.m., returned about 4 p.m., bringing back the horse with his tongue protruding 7in. or 8in., and unable to draw it back into his mouth.

The veterinary surgeon who examined the horse the following day, proved that he found the roots and lower part of the tongue much lacerated, and the mouth torn and clogged with clotted blood—the injury, he considered, might have been done by a violent pull of the tongue on one side. He was obliged to amputate 5in. of the tongue; and the horse is likely to recover.

The prisoner's statement was that the horse bit at him and he did it in a passion.

There was no evidence to show that any instrument beyond the hands had been used.

The prisoner's counsel contended that no instrument having been proved to be used in inflicting the injury, the prisoner could not be convicted under the 24 & 25 Vict. c. 97, s. 40.

For the prosecution it was maintained that under the statute it was not necessary to show that the injury had been caused by any instrument other than the hand or hands of the prisoner.

The prisoner's counsel, on the point being reserved, declined to address the jury, and a verdict of guilty was found by them.

I respited the judgment, and liberated the prisoner on recognisance, in order that the opinion of the Justices of either Bench, and the Barons of the Exchequer, might be taken on the question:

Whether the prisoner was properly convicted of the wounding there being no evidence to show that he used any instrument other than his hand or hands?

The 24 & 25 Vict. c. 97 ("Malicious Injuries to Property Act"), s. 40, enacts:—"Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement."

No counsel was instructed to argue for the prisoner.

*Sawyer*, for the prosecution.—The conviction was right. The only count in the indictment was for wounding. A count for maiming was omitted as the injury was not considered permanent. The words of the statute do not require that the wound should be inflicted by any instrument, nor is there any authority to that effect. In *Reg. v. Jeans* (1 Car. & K. 539) the decision was that in the case of "maiming" under the corresponding section of the repealed statute it must be a permanent injury. In *Ree v. Owens* (1 Moo. C. C. 205), where the prisoner poured a quantity of nitrous acid into the ear of a mare, some of which getting into the eye produced immediate blindness, it was held to constitute



a maiming within the statute. And in *Rex v. Hughes* (2 C. & P. 420), where the prisoner was indicted for feloniously wounding a sheep, and it appeared that he had set a dog at the sheep, and that the dog by biting had inflicted several severe wounds, Parke, J., held that this was not a wounding within the statute. In *Rex v. Harris* (7 Car. & P. 446), where the prisoner was indicted under 9 Geo. 4, c. 31, s. 12, (a) for wounding a female by biting off the end of her nose, Patteson, J., told the jury that in *Rex v. Stevens*, which had occurred a short time ago, the prisoner had been indicted under the same section of the same statute for biting off the joint of a policeman's finger, and the case having been reserved for the opinion of the fifteen judges, they had determined that the offence of biting off the joint of a finger did not come within the words "stabbing, cutting, or wounding;" and the decision proceeded on the ground that it was evidently the intention of the Legislature, according to the words of the statute, that the wounding should be inflicted with some instrument, and not by the hands or teeth, and, therefore, in the present case they must acquit the prisoner, who, however, would not escape punishment if she was guilty, as she would be indicted for an "aggravated assault." In the present statute the words are different, "kill, maim, or wound." The case of *Rex v. Jennings* (2 Lew. C. C. 139) was then cited.

COCKBURN, C.J.—The decision in *Rex v. Stevens* has been satisfactorily accounted for. In the stat. 9 Geo. 4 the word "wound" was held to have a specific meaning on account of the words with which it was in conjunction. In the present case there is no such difficulty. The 24 & 25 Vict. c. 97, s. 47, makes it an offence to kill, maim, or wound any cattle. The word "wound" is distinguishable from maim, which implies a permanent injury, whereas a wound is any mutilation or laceration which breaks the continuity of the outer skin. The injury may be as great when produced by manual power as by an instrument, though in the former case it is not evidence of so much malice, but wounding in both cases is equally within the statute. In altering the language in the 24 & 25 Vict. the Legislature may have intended to get rid of the difficulty occasioned by the language of the previous statute.

The other Judges concurred.

*Conviction affirmed.*

(a) The first part of the section speaks of shooting at and drawing a trigger upon a person, and attempting to discharge loaded arms at a person, and then proceeds to say, "or shall unlawfully and maliciously stab, cut, or wound any person," &c.

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## COURT OF EXCHEQUER.

*April 28, 1868.*

(Before KELLY, C.B., MARTIN, B., and PIGOTT, B.)

SHAW (app.) v. MORLEY (resp.) (a)

*Betting Houses Suppression Act—16 & 17 Vict. c. 119—Office or place.*

*On land on which there was a racecourse, a small temporary wood structure without a roof was erected, and there were boards in it covered with baize used as desks. A man sat at each desk and entered bets in books made with persons in front of the structure, and received deposits thereon. Over the structure was the name of the proprietor, and betting lists were exhibited in front of the structure :*

*Held, that this was an office or place within "The Betting Houses Suppression Act" (16 & 17 Vict. c. 119, s. 3).*

CASE stated by Justices of Doncaster, under 20 & 21 Vict. c. 43. The material facts are as follows :

On the 19th of September, 1867, at Doncaster Petty Sessions, an information was preferred against the appellant by the respondent under the 16 & 17 Vict. c. 119, s. 3, for having the care and management of and assisting to conduct the business of a certain office and place within the limits of the borough of Doncaster, being then and there opened, kept, and used for the purpose of betting with persons resorting thereto, and for the purpose of money being received by and on behalf of the occupier and keeper of the said office and place as and for the consideration for an assurance, undertaking, promise, and agreement, expressed or implied, to pay money on certain events and contingencies of and relating to a certain horse race contrary to the form of the statute, &c.

The corporation of Doncaster, as lords of the manor, are owners of the soil of the Doncaster Town Moor, commonly called the racecourse. Upon a portion of this ground have been built certain race stands, and the ground upon which they

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

are built, and that adjoining and in front, is inclosed by iron railings, and called the Inclosure. SHAW (app.)  
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—  
*Betting houses.*

On the east side of the inclosure, at a distance of 6ft., is a permanent wooden palisade, and the space so formed about 44yds. long, by 6ft. deep, was, up to the year 1866, not employed during the races except for the purposes of police.

In 1867, previously to the race meeting of that year, the committee of the Town Council that managed the race meetings let to one William Nicholl the use of the said strip of land at the east end of the grand stand inclosure for the four race days of the race meeting of September, 1867, for the purposes of betting and exhibiting betting lists.

On the race day of the 10th of September, 1867, the said strip of land, so let to the said William Nicholl as aforesaid, was partitioned, and upon each plot of land so partitioned a wooden structure was erected 5ft. high, the iron palisades above mentioned being at one side and the wood fence above mentioned on the other. These structures presented two frontages, and the structure of which the appellant was charged with having the care and management was covered with green baize, and had boards used as desks fronting each way. There was a book on each desk, and a man sat at each desk who acted as clerk, and recorded the proceedings in the books. Over this structure, on a board fronting both ways, was the name and address, "William Nicholl, of Nottingham." There were papers partly written and partly printed on it with the names of racehorses and betting prices. The betting list exhibited on it the odds upon and against each horse in each race, which the proprietor of the structure, William Nicholl, was willing to bet. The appellant, Shaw, transacted the betting business at one frontage of this structure; he betted the odds, six half sovereigns to one, against a horse called Knight Errant, in the Great Yorkshire Handicap, received a deposit of half a sovereign, and called out the transaction to the clerk at the desk, who entered it in the book, and gave to the taker of the odds a card, on which were a number and the following words, "William Nicholl, Nottingham. All in run or not. All bets paid immediately the winner has passed the scale. No objection afterwards will on any consideration be entertained." Other similar transactions by the appellant took place on the same day.

It was contended, *inter alia*, on the part of the appellant, that the structure on the race common was not a "house, office, room, or place" within the meaning of the act.

The Justices, however, being of a contrary opinion, convicted the appellant.

The questions for the opinion of this Court were—first, whether the structure was a "betting office" within the meaning of the act 16 & 17 Vict. c. 119, s. 3; secondly, whether the structure was a "place" within the meaning of the same act.

The 16 & 17 Vict. c. 119, ss. 1 and 3 are as follows:

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Sect. 1. "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, or as or for the consideration for any assurance, undertaking, promise, or agreement, expressed or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid, and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law."

Sect. 8. "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them, and any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof," &c.

*Manisty*, Q.C., for the appellant.—The structure in question was not an "office or place" within the 16 & 17 Vict. c. 119, s. 3. The act contemplated houses and buildings of a substantial and permanent character, and not a temporary structure of this nature. In *Doggett v. Catterns* (34 L. J. 159, C. P.) it was held that a person who resorted daily to a certain spot under a tree in Hyde Park, and made that his place of business for the purpose of making bets on horse races, and numbers of persons used to go there and bet with him, was not liable to the penalty under sect. 3 for keeping or using a house, office, or other place for the purposes of betting. It was not intended by the Legislature to interfere with betting on racegrounds, but to put down betting houses and places of that kind. All that the racing committee have done is to confine this kind of betting to a particular part of the ground. The case is very much like *Doggett v. Catterns*.

*Sleigh*, for the respondent, was not called upon.

KELLY, C.B.—I am of opinion that the decision of the magistrates was right. The question is, whether this structure, as it is

called in the case, was "a house, office, room, or other place opened, kept or used," for the purpose of betting with persons resorting thereto, or for any of the purposes against which the 16 & 17 Vict. c. 119, s. 3, was intended to provide? If we were to hold that this structure was not an office or place within the meaning of the act, we should be making the act of no avail, for it would only be necessary for any one wishing to open and use a betting office, to copy the structure described in the case in order to set the act at defiance. It makes no difference whether this structure had a roof or not, or whether it was or was not on wheels, or whether it was movable or fixed by some means or other in the earth. It was a structure in which the business of betting was conducted, and in my opinion came closely within the meaning of the words "office or place" used in the act. It further appears that the purpose to which the structure was applied was contrary to the provisions of the act, and is within the mischief described in the preamble to the act, which the act was intended to remedy.

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(resp.)

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MARTIN, B.—I am of the same opinion. I think this structure was both an "office" and a "place," within the meaning of the act. What seems to me most like it is the kind of small offices on wheels used in the Liverpool Docks, by merchants, for the purpose of transacting their shipping business. But this is something beyond, the structure is fixed and the owner or person using it is confined to one spot, and he does there what the act of Parliament has declared to be illegal and was designed to prevent.

PICOTT, B.—I am of the same opinion. The enacting clause appears to me to include the present case, and to prevent this mode of betting upon racecourses.

*Conviction affirmed.*

## CENTRAL CRIMINAL COURT.

*December 18, 1867.*

(Before Mr. Justice LUSH.)

REG. v. WILLIAM EDGELL AND RICHARD SMITH. (a)

*Arson — "House" — "Building" — Unfinished structure — 24 & 25 Vict. c. 97.**An unfinished structure intended to be used as a house is not a house within the meaning of the 24 & 25 Vict. c. 97.**Quære. Whether such a structure is a building within the meaning of the same statute?*

**W**ILLIAM EDGELL and Richard Smith were indicted for feloniously setting fire to a house of John Wilcock Jacob. The first three counts charged the setting fire to a house, the last three the setting fire to a building.

*Sleigh, F. H. Lewis, and Straight prosecuted.**M. Williams defended Edgell.**Lilley defended Smith.*

The defendants had made a fire in several places on the floor of an unfinished building intended to be used, when finished, as a dwelling-house.

*Williams* (at the close of the case for the prosecution) submitted that there was no case on the first three counts of the indictment, in which the building in question was described as a "house," it having been decided that an unfinished building intended for a dwelling-house was not a house within the meaning of the statute, 24 & 25 Vict. c. 97.

LUSH, J., was of opinion that the first three counts could not be sustained.

*Williams* further contended that the other three counts, describing the place as a building, were also bad, the statute evidently intending to refer to a complete and not an unfinished building.

LUSH, J., said he would consider the question, and, if necessary, reserve it.

*Not guilty.*

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.



## CENTRAL CRIMINAL COURT.

*December 19, 1867..*

(Before Mr. Justice LUSH.)

REG. v. THOMAS WEBB.(a)

*Witness—Prisoner under sentence of death—Incapacity.*

*A person under sentence of death is incapable of being a witness.*

THOMAS WEBB was indicted for unlawfully assaulting Frederick Collins, and causing him actual bodily harm.

*Ribton and Cunningham prosecuted.*

*Daly defended.*

At the close of the case for the prosecution, *Daly* proposed to call for the defence a prisoner named Thompson, a man who had just previously been convicted of murder, and sentenced to death.

LUSH, J., doubted whether a felon under sentence of death was an admissible witness, and asked if *Daly* had any authority for the course he proposed to take.

*Daly* said he had no direct authority, but he conceived that under Lord Denman's Act (6 & 7 Vict. c. 85, s. 1) such a course was authorised.

LUSH, J., said he considered the witness was not a competent one. A person under sentence of death stood in a different position from an ordinary felon. Under the old law a person attainted and sentenced to death was deemed civilly dead, and he did not think his capacity as a witness was restored by the 6 & 7 Vict. c. 85, s. 1, and he could not, therefore, receive the evidence, but if it became necessary he would reserve the point.

*Not guilty.*

(a) Reported by EDWARD T. E. BEALEY, Esq., Barrister-at-Law.

## CENTRAL CRIMINAL COURT.

*January 29, 1868.*

(Before Mr. Justice WILLES.)

REG. v. JAMES CONNING. (a)

*Depositions taken abroad—Absence of witnesses—Merchant Shipping Act (17 & 18 Vict. c. 104, s. 270).**Witnesses, whose evidence had been taken abroad by the British Vice-Consul under the 17 & 18 Vict. c. 104, s. 270, were officers of a British sailing vessel which was stated, by an officer of the Board of Trade, from examination of official records, never to have been in this country:**Held, that it was sufficiently proved that the witnesses were not in the United Kingdom, and the depositions were accordingly admitted in evidence.*

**JAMES CONNING** was indicted for that he being a British subject, feloniously did kill and slay John Wyers, in a certain foreign port, to wit, Fayal, one of the Azores.

*Poland and Beasley prosecuted.**Cooper defended.*

Thomas Leprelli said:—I am the master of the schooner Wave, of Guernsey. On the 3rd of November last, I was with my schooner at Fayal, one of the Azores, belonging to the kingdom of Portugal. Mr. Dart is the British Vice-Consul there. I received the prisoner from him to bring him to this country. The prisoner said the Fredonia (on which the manslaughter took place) was bound from Fayal to Boston. I have been back to Fayal again since then. I was there at Christmas, and left on the 6th of January. The Fredonia was not there then, and they had not heard of her arrival at Boston. I brought over some papers which I transmitted to the Board of Trade; they were given to me by Mr. Dart, the Vice-Consul, at the same time as I received the prisoner. The Fredonia trades between Fayal and Boston.

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

Henry Taylor.—I am a clerk in the office of the Registrar-General for seamen, Adelaide-place, London Bridge. That is a department of the Board of Trade. I produce some depositions, which purport to be signed by the British Vice-Consul at Fayal. I also produce the certificate of the registration of the *Fredonia*. It is an official copy of the register. She is a sailing vessel. She has never been in this country. I have searched for the purpose of ascertaining.

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JAMES  
CONNING.  
—  
1868.  
—  
*Evidence—  
Depositions.*

The depositions were then tendered in evidence under the 17 & 18 Vict. c. 104, s. 270. They contained the statements of various officers of the *Fredonia*, and purported to be taken in the presence of the accused by the British Vice-Consul.

The 17 & 18 Vict. c. 104, s. 270, enacts :—“ Whenever in the course of any legal proceedings instituted in any part of Her Majesty’s dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject matter of such proceeding, then upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, or if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject matter before any justice or magistrate in Her Majesty’s dominions, or any British consular officer elsewhere, shall be admissible in evidence subject to the following restrictions ; (that is to say,)

- (1.) If such deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom :
- (2.) If such deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession :
- (3.) If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused.

Every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom the same is made ; and such judge, magistrate, or consular officer, shall, when the same is taken in a criminal matter, certify if the fact is so, that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition ; and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified ; but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any act of Parliament, or by any act or ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature,

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Evidence—  
Depositions.

to make such depositions admissible in evidence, or to interfere with the practice of any Court in which depositions not authenticated as hereinbefore mentioned, are admissible.”

WILLES, J., said he thought it was sufficiently shown that the witnesses whose evidence was contained in the depositions were not in the United Kingdom at the present time, and as the depositions purported to be taken in the presence of the prisoner and of the British Vice-Consul, and also to be signed by the latter, they would be admitted in evidence.

They were accordingly read.

*Not guilty.*

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## HOME CIRCUIT.

### KENT SPRING ASSIZES.

*March 13, 1868.*

(Before Mr. Justice BYLES.)

REG. v. SAMUEL MARTIN.(a)

*Manslaughter—Evidence.*

*The prisoner was charged with manslaughter. The evidence showed that the prisoner had struck the deceased twice with a heavy stick, that he had afterwards left him asleep by the side of a small fire in a country by-lane during the whole of a frosty night in January, and the next morning, finding him just alive, put him under some straw in a barn, where his body was found some months after. The jury were directed that if the death of the deceased had resulted from the beating, or from the exposure during the night in question, such exposure being the result of the prisoner's criminal negligence, or from the prisoner leaving the boy under the straw ill, but not dead, the prisoner was guilty of manslaughter.*

THE prisoner was indicted for the manslaughter of a boy unknown, on January 15, 1867, at Appledore, in Kent.

The prisoner was a tramping sweep, and he was travelling about in the autumn of 1866 with Caroline Buckman. In October of that year the boy, who was about thirteen or fourteen

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

years of age, joined them, and travelled about with them, and was in the habit of sweeping chimneys for the prisoner. They all used to sleep out of doors or in outhouses. According to the evidence of Caroline Buckman, it appeared that on or about January 15, 1867, they all supped in the evening by a fire in a by-lane at Appledore, and during the time which they spent by the fire, the prisoner struck the boy twice with the stick on which their kettle was usually hung. She also stated that she and the prisoner went into a barn, which she had got leave for them to sleep in, the boy being left by the fire with some food by his side, which had been tied up by the prisoner for him; the barn door was not locked, the prisoner saying that he would tie it with a handkerchief, so that the boy might come in, and he did so fasten it. There was a considerable quantity of snow on the ground, and a sharp frost at the time. Early on the following morning the prisoner got up and told Caroline Buckman that he was going to look for the boy, and he went to do so, and on returning he told her that the boy was frozen to death, but afterwards said to her that he was alive and groaning, and desired her to say nothing about it. The prisoner put the boy under some trusses of straw in the barn, and then left, accompanied by Caroline Buckman.

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v.  
SAMUEL  
MARTIN.

1868.

*Manslaughter.*

One or two witnesses stated that on or shortly before January 15, 1867, the prisoner had struck the boy, whilst leaning against a hedge, several severe blows with a thick stick, and that the boy screamed and appeared ill; and another witness spoke to his making the boy ascend a chimney about the same time, which the boy objected to climb on account of its being too small, the prisoner stating that his reason for objecting was that his knees were sore.

The prisoner was apprehended on June 17, 1867, and he shortly afterwards conducted a policeman to the barn where he had left the boy, and the body of the boy was found there under the straw in an advanced stage of decomposition, which rendered it impossible for the medical man to state the cause of death, or to speak to any marks of violence, but he stated that there were no bones broken.

*Biron and Marsham*, for the prosecution.

BYLES, J., left to the jury the following questions:—Did the death result from beatings administered by the prisoner? Did the death result from the exposure on the night in question, and was that exposure the result of criminal neglect on the part of the prisoner? Did the death result from the prisoner leaving the boy in the barn under the straw ill, but not dead? And he told the jury that, if they found that death resulted from any one of the above causes, or any two of them, or all three together, they should find the prisoner guilty.

The jury found the prisoner guilty, and he was sentenced to twenty years' penal servitude.

## CENTRAL CRIMINAL COURT.

*April 28, 1868.*

(Before BRAMWELL, B., and KEATING, J.)

REG. v. RICHARD BURKE, JOSEPH CASEY, and HENRY MULLADY.(a)

*Alien—Jury de medietate linguæ.**An alien is a subject of a foreign state who has not been born within the allegiance of the Crown of this kingdom.**The mere production of a passport found on a prisoner, which is proved to be granted by the authorities of a foreign state to natural-born subjects only, is not evidence of his being an alien.*

GEORGE BERRY (*alias* Richard Burke, *alias* Winslow, *alias* Wallace), Joseph Theobald Case, and Henry Shaw (*alias* Mullady), were indicted for that they, together with divers other persons unknown, did feloniously, wickedly, and unlawfully compass, devise, and intend to depose our Lady the Queen from the style, honour, and royal name of the imperial Crown of the United Kingdom, and that they did manifest such intention by certain overt acts set out in the indictment. In other counts, the overt acts were alleged to have taken place in Ireland, and in the county of Warwick, from which county the indictment had been removed into this Court under the 19 & 20 Vict. c. 16.

*Sir J. B. Karlake*, Q.C. (Attorney-General), *Sir W. B. Brett*, Q.C. (Solicitor-General), *Hardinge Giffard*, Q.C., *Poland*, and *Archibald*, prosecuted.

*Ernest Jones* and *McDonald* defended Burke.

*Jones*, on behalf of Burke, applied to the Court for a jury *de medietate linguæ*, upon a suggestion that he was an alien.

*Karlake* submitted that the mere suggestion of his being an alien was not sufficient without the further statement that he was not a natural-born subject of Her Majesty, and called the attention of the Court to the case of *Reg. v. Warren*, tried in Dublin, in support of his view.

BRAMWELL, B., received the suggestion, but on the footing that it meant that he was not a natural-born subject.

(a) Reported by EDWARD T. E. BEALEY, Esq., Barrister-at-Law.



*Karslake*, Q.C. (Attorney-General), having traversed this suggestion, the jury were sworn to try the issue.

*Jones*, in support of the suggestion, put in a passport belonging to Burke, and called De Tracey Gould, a member of the American bar, as a witness, with a view of showing that such a passport was only granted to natural-born citizens of the United States.

*Karslake* objected to this evidence.

BRAMWELL, B., ruled that it was inadmissible.

The jury therefore found that Burke was not an alien, and the case proceeded before an ordinary jury.

*Guilty.*

REG.  
v.  
RICHARD  
BURKE,  
JOSEPH CASEY,  
and  
HENRY  
MULLADY.

1868.

*Alien—  
Evidence.*

## CENTRAL CRIMINAL COURT.

*May 7, 1868.*

(Before the Right Hon. RUSSELL GURNEY, Q.C., Recorder.)

REG. v. SIDNEY WESTLEY.(a)

*Assault—Previous dismissal—Certificate of magistrate—24 & 25  
Vict. c. 100, s. 44—Recital of information and summons.*

*Where an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate, under the 24 & 25 Vict. c. 100, s. 44, appear to have been on the same day, it is prima facie evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day if he alleges that such is the case.*

*The defendant having appeared before the magistrate, the recital in the certificate of the fact of a complaint having been made, and of a summons having been issued, is sufficient evidence of those facts.*

**S**IDNEY WESTLEY was charged with assaulting Edward Scotney. The indictment was as follows:

*First count.*—That Sidney Westley, on the 20th of February, 1868, unlawfully and maliciously did inflict grievous bodily harm on Edward Scotney.

*Second count.*—That the said Sidney Westley afterwards, to wit, on the same day and in the year aforesaid, in and upon Edward

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

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—

Scotney unlawfully did make an assault and him, the said Edward Scotney, then and there did beat, wound, and illtreat, and did thereby then and there cause and occasion actual bodily harm to the said Edward Scotney.

*Assault—  
Certificate of  
dismissal—  
Indictment.*

To this indictment the defendant, Sidney Westley, pleaded the following special plea in bar:

The said Sidney Westley, in his own proper person, cometh into Court here, and having heard the said indictment read, saith that our said Lady the Queen ought not further to prosecute the said indictment against him the said Sidney Westley in respect of the offence in the said indictment mentioned, because he saith that heretofore, to wit, on the 7th of March, 1868, at the parish of Hammersmith, in the county of Middlesex, he, the said Sidney Westley, was, upon the complaint of the said Edward Scotney, summoned to answer the said assault now charged against him in the said indictment on which he is now arraigned before Charles Orchard Dayman, Esq., one of the magistrates of the police courts of the metropolis, who having heard what the said Edward Scotney had to allege on that behalf, and the evidence adduced by him in proof of the said offence, and having also heard what the said Sidney Westley then and there alleged in his defence, and it appearing to him, the said Charles Orchard Dayman, that the said assault was justified, he thereupon then and there dismissed the said complaint; and the said Sidney Westley further saith that the said assault and battery of the said Edward Scotney, which was so heard and dismissed as aforesaid, are one and the same assault and battery and not other and different, whereupon he prays judgment if our said Lady the Queen ought further to prosecute the said indictment against him the said Sidney Westley in respect of the said offence in the said indictment mentioned, and that the said Sidney Westley may be dismissed and discharged from the same.

The defendant also pleaded "Not guilty."

*Metcalf* prosecuted.

*Cooper* defended.

The certificate of the dismissal by the magistrate of a charge of assault against the defendant, on the day alleged in the indictment, given under the provisions of the 24 & 25 Vict. c. 100, s. 44, was put in on behalf of the defence, and evidence was given that the person named in the certificate and the prisoner were one and the same person, and that the defendant had appeared before the magistrate in answer to the charge of assault.

*Metcalf*, for the prosecution, submitted that, as the indictment, in the first count, charged the defendant with maliciously assaulting the prosecutor with intent to do him grievous bodily harm; and, in the second, with unlawfully assaulting and occasioning him actual bodily harm, while the certificate was only

pleaded to the said offence, and there was but one special plea to the whole indictment instead of a separate special plea to each count, the plea, even if good and proved, would only be an answer to one count, and not to the whole indictment. He also argued that the mere production of the magistrate's certificate only was not sufficient, but that it was also necessary to put in evidence the information or summons in order to show that the magistrate was acting within his jurisdiction.

*Cooper*, for the defendant, contended that the whole indictment was one, and contained substantially an allegation of but one offence; and that the plea, though it might be informal, was therefore good, if proved. He referred to *Reg. v. Eltrington* (9 Cox Crim. Cas. 86). On the second point he submitted that the recital in the certificate of the information and summons, coupled with the maxim *omnia præsumuntur ritè et solemniter esse acta, donec probetur in contrarium*, was sufficient evidence that everything had been done legally.

GURNEY, Recorder (after consulting Willes, J.), said that though the pleadings were in a very entangled state, Willes, J., thought there were materials on which it was possible to try whether the assault charged in the indictment and that referred to in the plea were one and the same. The prisoner having appeared before the magistrate, the recital in the certificate of the fact of a complaint having been made, and of a summons having issued, was sufficient evidence of those facts. He thereupon directed the jury that the assault charged in the indictment, and that referred to in the plea, appearing to have taken place on the same day, and the prosecutor not having shown that any other assault had been committed on the same day, they must find a verdict to that effect.

The jury returned a verdict accordingly.

*Metcalf* then proposed, as there were two counts in the indictment and only one plea, to try the defendant on the first count.

GURNEY, Recorder.—No.

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v.  
SIDNEY  
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1868.

Assault—  
Certificate of  
dismissal—  
Indictment.

## CENTRAL CRIMINAL COURT.

June 4, 1868.

(Before the Right Hon. RUSSELL GURNEY, Q.C., Recorder.)

REG. v. PHILLIPS. (a)

*Juror summoned in error, but not returned—Practice.*

*A juror was summoned in error, but not returned in the panel, and in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, and a fresh jury constituted by taking another jurymen in the place of the one who had served in error.*

**T**HE defendant Phillips was charged with a misdemeanor.

It appeared that a person named Thomas Monk, of Waverley-road, had received a summons addressed to Thomas Monk, of Hereford-road, to attend and serve as a jurymen at this session of this Court. On the Saturday previous to the session, the summons was withdrawn by the summoning officer, and this Thomas Monk was told that his presence would not be required. The summoning officer then served this summons on the Monk of Hereford-road, for whom it was really intended, but his Christian name was Richard, and not Thomas. On the panel of jurymen the sheriff had returned the name of Thomas Monk, of Hereford-road.

On the first day of the sessions Thomas Monk, of Waverley-road, attended, and on the name of Thomas Monk being called out, answered to it, and was sworn as one of the jury empanelled to try the above prisoner. When the trial had proceeded a little way, it was discovered that the other Monk was in attendance. The question was then raised whether Thomas Monk was a duly-constituted juror for the trial of the defendant.

In answer to a question from the Recorder, the Clerk of the Court said the form of making up that portion of the record which referred to the empanelling of the jury was, that the jurors were taken from those "summoned and returned" by the sheriff.

(a) Reported by EDWARD T. E. BULLY, Esq., Barrister-at-Law.

*Metcalf*, for the prisoner, suggested either that the Court had power to take a jurymen in case of necessity *de circumstantibus*, or else that the Court should amend the panel by adding to it the name of Thomas Monk, of Waverley-road.

GURNEY, Recorder, said he thought it better to discharge the jury from giving a verdict in the case, and then take a fresh jurymen from among those summoned and returned by the sheriff in the place of Thomas Monk.

The jury were accordingly discharged, and another jurymen from those who were in waiting in the Court put in the place of Thomas Monk. The panel of jurymen was also amended by the alteration of the Christian name of the Monk who resided in Hereford-road, and who was summoned and returned, from Thomas to Richard.

Rex.  
v.  
PHILLIPS.  
—  
1868.  
—  
Jury—  
Practice.

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## CENTRAL CRIMINAL COURT.

*August 17, 1868.*

(Before T. CHAMBERS, Q.C., Common Serjeant.)

REG. v. HENRY MOPSEY.(a)

*Forgery—Bill of exchange—No signature of drawer.*

*The acceptance to what purported to be a bill of exchange was forged.*

*At the time however this was so forged, the document had not been signed by the drawer :*

*Held, that the document, not having the signature of the drawer attached to it at the time the acceptor's name was forged was not a bill of exchange.*

**H**ENRY MOPSEY was indicted for feloniously forging and uttering an acceptance to a bill of exchange for 20*l.* 18*s.*, with intent to defraud.

*Macrae Moir* prosecuted.

*Pater* defended.

George Mells, the prosecutor, said that the prisoner was his traveller, and that he had a customer of the name of Restall, who owed him some money. The prosecutor, not being able to get a settlement of the account from Restall, gave the prisoner the bill

(a) Reported by EDWARD T. E. BULLER, Esq., Barrister-at-Law.

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v.  
HENRY  
MORSEY.

—  
1868.  
—

*Forgery—Bill  
of exchange.*

of exchange mentioned in the indictment for him to get accepted by Restall. At that time there was no name of a drawer attached to the bill, but room was left for that signature to be filled up afterwards. In a day or two the prisoner brought the bill back to the prosecutor, apparently accepted by Restall. It turned out, however, that the signature of Restall had been forged by the prisoner.

*Pater*, at the close of the evidence for the prosecution, submitted that there was no case to go to the jury, as the document in question not having been signed by the drawer until after the acceptance was placed upon it, could not be said to be at that time a bill of exchange.

*Macrae Moir* contended that the prisoner had committed forgery, forgery being the alteration of any document to another man's hurt, and it was for the jury to say what the intent of the prisoner was.

CHAMBERS (Common Serjeant) was of opinion that the objection was well founded. The document could not be a bill of exchange at the time the acceptance was written, and, therefore, upon this indictment a conviction could not be obtained.

*Not guilty.*



## CENTRAL CRIMINAL COURT.

*August 18, 1868.*

(Before the Right Hon. RUSSELL GURNEY, Q.C., Recorder.)

REG. v. CHARLES PRINCE.(a)

*Larceny—Adulterer—Venue.*

*A wife took her husband's goods from Notting-hill, and she was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession. There was no evidence that they were under his control at any place within the jurisdiction of the Central Criminal Court :*

*Held, that that Court had no jurisdiction to try the prisoner for the present offence.*

CHARLES PRINCE was indicted for stealing one trunk, one comb, and other articles, the property of Henry Allen.

*F. H. Lewis and Besley prosecuted.*

*Collins defended.*

The prosecutor and the prisoner lived near each other at Notting-hill; the former was married, and the latter was a constant visitor at his house. The prosecutor, having been away from home for a few days, returned on the 1st of July, and found that his wife had gone away, taking with her the articles mentioned in the indictment. Prince was also missing from the neighbourhood of Notting-hill. He had not, however, been seen near the prosecutor's house, or in company with his wife before she ran away. On the 4th of July, the prisoner and Mrs. Allen were found at Liverpool, on board the *City of Cork* steamer, bound for New York, having in his possession several boxes labelled "Mr. Prince, New York." They were followed to Cork, and there in one of these boxes was found the prosecutor's property.

*Collins* submitted that there was no evidence of any possession of the goods, on the part of the prisoner, within the jurisdiction of the Central Criminal Court. Not only were the goods not found until the vessel arrived in Ireland, but Prince

(a) Reported by EDWARD T. EL. BESLEY, Esq., Barrister-at-Law.

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v.  
CHARLES  
PRINCE.  
—  
1868.  
—  
*Larceny—*  
*Venue*

was not seen in the company of Mrs. Allen, or in any way dealing with the prosecutor's property until he arrived at Liverpool.

*Lewis* contended that it was a question for the jury, whether the wife did not take away the property by agreement with the prisoner, in which case there would be a joint taking. He referred to *Reg. v. Thompson* (15 L. T. N. S. 101).

GURNEY, Recorder, said he could not see any evidence of a joint possession until Prince and Mrs. Allen were at Liverpool, and, therefore, this Court could have no jurisdiction.

*Not guilty.*

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### CENTRAL CRIMINAL COURT.

*April 20—26, 1868.*

(Before COCKBURN, C.J., and BRAMWELL, B.)

REG. v. WILLIAM DESMOND AND OTHERS. (a)

*Murder—Conspiracy to liberate a prisoner—Acts of that prisoner.*

*A number of persons were charged with murder committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognisant :*

*Held, that acts of that prisoner, within the prison, and articles found upon him, were admissible in evidence against the persons so charged.*

**W**ILLIAM DESMOND, Timothy Desmond, Nicholas English, John O'Keefe, Michael Barrett, and Anne Justice were charged with the wilful murder of Anne Hodgkinson.

Sir J. B. Karslake (Attorney-General), Sir W. B. Brett, (Solicitor-General), *Hardinge Giffard*, Q.C., *Poland* and *Archibald*, prosecuted.

*Warner Sleigh* defended William Desmond, *Straight* defended Timothy Desmond, *Keogh* defended English, *M. Williams* defended O'Keefe and Anne Justice, *Baker Greene* defended Barrett.

The evidence offered by the prosecution was to show that there was a conspiracy among the prisoners to aid one Burke, a prisoner on remand, in the House of Detention, Clerkenwell, in

(a) Reported by EDWARD T. E. BRADLEY, Esq., Barrister-at-Law.

effecting his escape therefrom, and that, in pursuance of that conspiracy, certain acts were done, by the last of which, the blowing in of the prison wall in Corporation-lane, on the 18th of December, 1867, the death of the deceased was caused.

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v.  
WILLIAM  
DESMOND  
AND OTHERS.

In the course of the trial a witness named Thomas Maskell was called.

1868.

Thomas Maskell said: I was a warder in the House of Detention in December. I remember taking the prisoner Burke out to exercise at 2.45 on the afternoon of the 12th of December.

Murder—  
Conspiracy to  
aid an escape.

*Baker Greene* objected to the evidence which this witness was about to give, as it related to something which was done by Burke inside the prison, and not to any act of the prisoners now on their trial.

*Karslake* (Attorney-General) said he offered the evidence in proof of a conspiracy to aid Burke in his escape, in pursuance of which conspiracy the acts done by the prisoners were carried out.

*Per Curiam*: The evidence is admissible.

Maskell then continued: Burke was a prisoner in the House of Detention, and charged with treason-felony, and was then in the exercising yard, walking round the circle with the other prisoners in the yard near Corporation-lane. There were two rings of persons exercising, and Burke was in the outer ring. I observed him fall out of the ring against the wall at the farthest point from the scene of the explosion, and near the Governor's garden. The spot was the farthest he could get from the outer wall. He took off his side-spring boot, wiped his foot and stocking with his hand slowly, at the same time looking up at the houses in Corporation-lane. He then put his boot on, fell in the rank, and walked on with the other prisoners. This was done very slowly; it was about 4.25 p.m. The next day I saw the effect of the explosion, and observed that there was nothing damaged by it within five or six yards of the spot where Burke went.

In the early part of the case reference had been made by a witness named Mullany to a letter sent by Burke to one of the prisoners, in which there was some writing in invisible ink, which had been made visible by means of copperas, and secondary evidence of that writing had been received. Afterwards the prosecution called

James Thompson (police inspector), who said: I arrested Burke on the 20th of November. At the station I searched him, and found a little glass bulb, with some substance in it, in his possession.

*Baker Greene* objected to the evidence on the ground that it took place in the absence of the present prisoners, and that the contents of a letter, with secret writing within it, referred to by Mullany, had not been made evidence, because Mullany could not read writing, and therefore could not know what were the contents of that document.

The Court considered that as Mullany had given secondary

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v.  
WILLIAM  
DESMOND  
AND OTHERS.

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Murder—  
Conspiracy to  
aid an escape.

evidence of the contents of that letter, and that evidence had been received, no objection being taken at the time, the evidence proposed to be submitted by the Attorney-General was admissible, and the Court also considered that, apart from the letter, it was receivable in evidence.

James Cape (a warden in the House of Detention) deposed to finding some green mineral among the clothes brought to the prison for Burke's use.

These two portions of mineral were given to Dr. Odling to test, and he said that they were chloride of gold, and that communications written with a solution of it were invisible until they were washed with a solution of copperas (sulphate of iron), and that the characters would then assume a brown tinge.

*Barrett guilty. The others not guilty.*

## CENTRAL CRIMINAL COURT.

*August 20, 1868.*

(Before LUSH, J.)

REG. v. ALEXANDER ARTHUR MACKAY.(a)

*Evidence—Dying declaration—Admissibility.*

*In order to render a statement of a deceased person, not on oath, evidence, the prosecution must show that such person at the time of making the statement was distinctly aware of the approach of death, and had no hope of possible recovery.*

ALEXANDER ARTHUR MACKAY was indicted for the wilful murder of Emma Grossmith.

*Poland and Beasley prosecuted.*

*Ribton defended.*

George Grossmith, the husband of the deceased, after giving other evidence, said: On the Monday she (the deceased) made a statement to me. She was sensible then. She died on the following Sunday. On the Monday she told me she should never get over it. She first asked me what I thought of her. I said, "I think it is very dreadful." She said, "Do you think I shall

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

ever get better?" I said, "I hope so;" and she said, "I never shall." I made no reply to that; but she said almost directly after, "I shall die, I shall die, the pain is so great." She also said several times, "I shall die through the pain in my head."

*Poland* proposed to give in evidence the statement of the deceased as a dying declaration.

*Ribton* objected, on the ground that the evidence as it stood was not sufficient to make the statement admissible, but that it must be clearly shown that, in the opinion of the person making the statement, she was on the verge of dissolution, and also that her death was imminent.

*LUSH, J.*, thought that before receiving the evidence it would be better to hear the medical testimony.

*John Jackson*.—I am a Fellow of the Royal College of Surgeons. On Friday morning, the 8th of May, I saw Mrs. Grossmith. She was lying on the floor, covered with blood. I did not examine her minutely then. I felt her pulse; at least I could not feel any pulse. She appeared to be dying. I continued to attend her till her death. At the time I first saw her, I thought the probabilities were that she would not live from minute to minute, till the afternoon; she then recovered her consciousness, and retained her intellect afterwards perfectly, with the exception of the Tuesday evening. She then had a little delirium, and on the day of the accident she wandered in her mind; with those exceptions, she retained her intellect till the time of her death. When I visited her on the Tuesday morning she made some incoherent remarks to me. I can hardly say how long she wandered; she did not answer my questions intelligibly while I was examining her. About the middle of the week following the injury I thought there was a chance of her recovery; but shortly afterwards she began to sink, and never rallied again.

*John Lee* (police constable) said: I was with Mrs. Grossmith on the Friday she was attacked, from ten in the morning till ten at night. She made a statement to me at three o'clock in the afternoon, which I put into writing. She was then in bed, and appeared to understand perfectly what she said. Before she made the statement she did not say whether she expected to live or die; but after three o'clock, and after she had made the statement, she said once or twice that she thought she should never get over it.

*John Reeve* (police constable.)—I was with the deceased on the day after this happened. She did not at any time say anything to me as to the state in which she was with regard to her illness. She made a statement about 3.15 in this day, which I took down in writing. She was perfectly sensible, but she had not said what she felt, or what she supposed her condition was.

This being all the evidence with reference to the state of the deceased at the time of her making the statements or declarations in question

*Poland* proposed to give these two statements also in evidence.

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v.  
ALEXANDER  
ARTHUR  
MACKAY.

1862.

Evidence—  
Dying  
declaration.

REG.  
v.  
ALEXANDER  
ARTHUR  
MACKAY.  
—  
1868.  
—  
*Evidence—  
Dying  
declaration.*

LUSH, J. (after consulting Gurney, Recorder), said that he was clearly of opinion that the two statements last offered were not receivable. It did not sufficiently appear that deceased had such a conviction of the imminent peril of death as would make them admissible. As to the other statement made to the husband he had considerable doubt. His own opinion was that it was admissible, but, as in a case of this kind he did not wish to reserve a case for the Court of Criminal Appeal, his inclination was to exclude it, but if pressed to receive the evidence he would do so.

*Poland*, after this expression of opinion, did not press the evidence, and it was therefore not given.

*Guilty.*

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### CENTRAL CRIMINAL COURT.

*June 11, 1868.*

(Before the Right Hon. RUSSELL GURNEY, Q.C., Recorder.)

REG. v. CHARLES MAYLE. (a)

*Embezzlement—Clerk or servant—Volunteer.*

*A person whose duty it is to obtain orders when and where he likes, and forward them to his principal for execution, and then has three months within which to collect the money for the goods sent, is not a clerk or servant.*

*If such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has had nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement if he does not pay over or account for the money so received.*

CHARLES MAYLE was indicted for embezzling the sums of 1l. 8s., 4l. 19s. 8d., and 2l. 19s. 2d., the moneys of John Bellamy Payne, his master.

*Torr prosecuted.*

*Straight defended.*

John Bellamy Payne said: I carry on business at Chard, in Somersetshire. In 1866 I employed the prisoner as my agent for the sale of cider in London. I consigned to him, and the invoices generally bore his name. That arrangement was not

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.



found to work well, and in February and March, 1867, I entered into a new arrangement with him. The prisoner was to obtain the orders and send them to me at Chard, and I had to deliver the goods to the several customers, and they were credited to me. I had new invoices prepared, and this of Mr. Hickman's is one of them. I call the prisoner therein my agent; the words are "Mr. Mayle, London agent." There is a notification that the accounts are to be paid on or after the 15th of October; that is the end of the cider season. The prisoner, after obtaining the orders, had to see to the return of the empties, and collect the money in October. His remuneration was one penny per gallon for the cider sold. He was to receive from me duplicates of the invoices I had sent in, and when he had received the money was to remit it to me. In the commencement of 1867 I received orders from him, and executed them. One of them was from Mr. Lawrence. Besides the orders he sent me during 1867, I had an order direct from Mr. Hickman, which I executed; and on the approach of the 15th of October I asked the prisoner to call for the money.

On cross-examination, this witness said: As he had no salary I had no right to command him to go anywhere to collect orders. It was perfectly optional with him whether he obtained orders or not. He had three months to collect the money in, and was not to collect it on any particular day. After March, 1867, he was my London manager, not my agent, but the invoices have London agent on them down to the present time.

The payment of the moneys by the customers was then proved, and also that the prisoner had not accounted for them.

*Straight* contended that, on this evidence, the prisoner was not a clerk or servant within the meaning of the act of Parliament, but only an agent, the bills being still sent out with "London agent" upon them. He referred to *Reg. v. Walker* (Dears. & Bell, 606) and *Reg. v. Bowers* (1 L. Rep. 41).

*Torr* submitted that as the prisoner was to collect the money after his employer sent him the duplicate orders, his duty as a servant then commenced.

*GUNEY*, Recorder, considered that the case of Mr. Hickman was a voluntary matter on the prisoner's part; and that in Mr. Lawrence's case, as the prisoner had a general employment to collect the money at any time within three months, that was perfectly inconsistent with the relationship of master and servant.

*Not guilty.*

REG.  
v.  
CHARLES  
MAYLE.

1868.

*Embezzlement*  
— Clerk or  
servant.

## CENTRAL CRIMINAL COURT.

*August 18 and 19, 1868.*

(Before the Right Hon. RUSSELL GURNEY, Q.C., Recorder.)

REG. v. SARAH RACHEL LEVERSON.<sup>(a)</sup>*Attorney and client—Privilege—Attorney a witness for prosecution.**A person, the real prosecutor in a case, had communications with her attorney in reference to certain dealings with the prisoner.**The attorney was called as a witness for the prosecution :**Held, that letters written by the client to her attorney could not be put in evidence by the prisoner's counsel :**Held, also, that the prosecutrix and her attorney might be cross-examined in reference to any privileged communications as to which they had given answers to questions addressed to them by the counsel for the prosecution ; but not in respect to such matters about which the attorney had volunteered information unasked :**Held, also, that matters which transpired during interviews at which the prisoner was present were not privileged.*

SARAH RACHEL LEVERSON was charged with obtaining from Mary Tucker Borradaile, by false pretences, 600*l.* Other counts charged her with conspiring with others to defraud the said Mary Tucker Borradaile of 3000*l.*

*Ballantine, Serjt., M. Williams, and Straight, prosecuted.**Digby Seymour, Q.C., Parry, Serjt., Sleigh, Serjt., and Butler Rigby, defended.*

In cross-examination, the prosecutrix said that she had had some correspondence with Mr. Haynes, who was then acting as her solicitor, in respect to her dealings with the prisoner.

*Seymour called for some of these letters.**Ballantine objected to the production of any letters written by the witness to Mr. Haynes.*

GURNEY, Recorder, did not think that Mr. Haynes could be called upon to produce them.

*Seymour then proposed to read one of the letters which had come into the possession of the defendant's attorney at Marl-*

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

borough-street police-court, and which bore the magistrate's signature.

*Ballantine* objected, on the principle that anything communicated to an attorney was sacred, and that, even if he were willing to hand over private documents, the law prevented him.

GURNEY, Recorder (after consulting Lush, J.), said that the objection was well founded. The privilege was the client's, and not the attorney's. The attorney could not be asked to say what the client had said to him; and, in the same way, if the communication were a written one, it could not be used without the client's consent.

REG.  
v.  
SARAH RACHEL  
LEVERSON.

1868.

Evidence—  
Attorney and  
client—  
Privileged  
communication.

*Jury (not able to agree) discharged.*

September 21—25, 1868.

(Before R. M. KERR, Esq., Commissioner.)

This prisoner was again tried on the same indictment as last session.

*Seymour* again, during the cross-examination of Mrs. Borradaile, proposed to put in some letters from her to her attorney, Mr. Haynes, which he had been subpoenaed to produce.

*Ballantine* objected, it having been settled by Gurney, Recorder, last session, that Mr. Haynes had not power to waive his client's privilege.

*Parry* urged that, although Mr. Haynes might object to produce his client's letters without her permission, yet, when she was in the witness box, no such privilege attached to her.

KERR, Commissioner, declined to receive the letters.

In a later stage of the case, the prosecution called as a witness the attorney, Mr. Haynes, and he was asked, in his examination in chief, questions as to certain matters in which he was engaged as Mrs. Borradaile's attorney, which he answered. He also volunteered certain statements in respect of matters about which he had not been asked.

In cross-examination, *Seymour* proposed to ask him questions about communications generally between Mrs. Borradaile and himself.

*Ballantine* objected to these questions, as the answers to them would involve, on the part of Mr. Haynes, a breach of his client's confidence; and, further, that the mere fact of Mrs. Borradaile and Mr. Haynes having interpolated evidence which they were not asked about, in respect to interviews and communications between them, did not form a foundation for cross-examination about such communications.

*Parry* submitted that, where the interview was in the prisoner's presence, as a third party, the privilege did not exist; and that,

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v.  
SARAH RACHEL  
LEVERSON.

1868.

*Evidence—  
Attorney and  
client—  
Privileged  
communication.*

even when it did originally exist, it was waived by the prosecution calling the attorney as a witness.

KERR, Commissioner (after consulting Keating, J.), considered that the client's privilege was not gone merely through her attorney being produced as a witness for the prosecution—the Queen being the real prosecutor, and not Mrs. Borradaile, who was compelled to give evidence; and that she might be cross-examined upon any point in reference to her interviews and communications with her attorney upon which the counsel for the prosecution had obtained an answer from her: that the same rule was to be observed with respect to the cross-examination of the attorney; but he could not be cross-examined upon anything which he had voluntarily added not in answer to any question from the counsel for the prosecution, as that might entirely destroy the client's privilege. Lastly, as to what took place in Madame Rachel's presence, the privilege was gone.

*Guilty.*

## CENTRAL CRIMINAL COURT.

October 28, 1868.

(Before LUSH, J.)

REG. v. JAMES ANDERSON (a).

*Merchant Shipping Act—Evidence—Depositions taken abroad—  
Absence of witnesses.*

*A witness whose evidence had been taken abroad by the British Consul under the 17 & 18 Vict. c. 104, s. 270, was captain of a British sailing vessel, which was stated, after examination of the official records by an officer of the Board of Trade, never to have been in this country. When some of the witnesses left the captain, he was in charge of the vessel at Bordeaux, but it was not known where she was then bound for, or whether she had since sailed: Held, that it was sufficiently proved that the witness was not in the United Kingdom, and his deposition was accordingly admitted in evidence.*

**J**AMES ANDERSON was indicted for that he being a seaman on board the Hatfield Brothers, a British ship out of Her Majesty's dominions, namely, on the river Garonne, at Panillac,

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

in France, did, on the 18th of September, murder John Williamson on board the said ship.

*Second count.*—Alleged that the prisoner was a British subject.

*Third count.*—Alleged that the murder was committed at Bordeaux, in France, and that the prisoner was a seaman on board the Hatfield Brothers.

*Fourth count.*—The same as the third, only alleging that the prisoner was a British subject.

*Fifth count.*—That the murder was committed on the high seas, and that the prisoner was a British subject.

*Sixth count.*—That the murder was committed on board a British ship in a foreign port, namely, Bordeaux.

*Seventh count.*—The same as the fifth, only omitting the last allegation.

*Eighth count.*—That the prisoner was a subject of Her Majesty, on land out of the United Kingdom, namely, at Bordeaux.

*Ninth count.*—Murder in the ordinary form.

*Poland and Besley* prosecuted.

*Montagu Williams* defended.

William Champion Parsons said :—I am a clerk in the Custom House, London. I produce a certified copy of the registration of the Hatfield Brothers. It is registered as a British ship. Port of registry : Yarmouth, N.S. (that is Nova Scotia), British built, 200 tons, Frederick Hatfield, captain and part owner, No. 51,997.

Joseph Dade said :—I am a clerk in the office of the Registrar General of British Seamen, a department of the Board of Trade. I produce some depositions which purport to have been taken before the British Consul at Bordeaux. I do not know where this vessel went to after she left Bordeaux. We have no record of her having been to this country ; I cannot say that we should have if she had been.

Jeffery Powers. said :—I was one of the crew of the Hatfield Brothers. I joined her on her last voyage. She belonged to Yarmouth, Nova Scotia, and carried the English flag. She sailed from Philadelphia for Bordeaux. Frederick Hatfield was the master, the same person that I saw before the English Consul at Bordeaux. On the 17th of September this vessel was in the Garonne ; on the 18th, she anchored about half-way up the river towards Bordeaux, near Panillac. She was afloat about 300 yards from the shore at a place where the river is half-a-mile wide, and the tide flows. This witness then detailed the facts of the case.

George Wellesley said :—I was one of the seamen on board the Hatfield Brothers. I am an American, and was born in Virginia. The witness then described what he knew of the occurrence, and continued :—I came to this country with last witness by direction of the Consul, on the 3rd or 4th of October, in the steamer Aurora, in order to be a witness in this case. The captain was left behind at Bordeaux in charge of the vessel when I left. The vessel was then discharging her cargo, and his presence was

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v.  
JAMES  
ANDERSON.

1868.

Practice—  
Evidence—  
Deposition of  
absent witness.

REG.  
v.  
JAMES  
ANDERSON.

1868.

Practice—  
Evidence—  
Deposition of  
absent witness.

necessary. I do not know where she was bound to, or whether she has left Bordeaux yet. The captain was a British North American.

*Poland* tendered the depositions of the captain before the British Consul at Bordeaux, produced by the witness Dade, and asked for them to be read under the provisions of the 17 & 18 Vict. c. 104, s. 270.

*Williams* objected to this being read on the ground that it must first be shown that the captain could not be found in the Queen's dominions.

*Poland* submitted that reasonable evidence had been given that the captain was not in this country, which was sufficient to satisfy the requirements of the statute, and referred to the case of *Reg. v. Conning* (32 J. P. 199).

BYLES, J., considered the evidence sufficient.

The deposition of the captain, Frederick Hatfield, was then put in and read, certified by the Consul to have been correctly taken in the presence of the prisoner, who was represented by counsel.

*Williams* (at the close of the case) took an objection to the indictment on the ground that the murder having been committed in the port of Bordeaux, the trial ought to have been had in France, and that this Court had no jurisdiction to try the offence.

BYLES, J., overruled the objection, but reserved a case for the opinion of the Court for Crown Cases Reserved. This case has since been argued, and the report will be found in its proper place.

*Guilty of manslaughter.*



## CENTRAL CRIMINAL COURT.

December 17, 1868.

(Before T. CHAMBERS, Esq., Q.C., the Common Serjeant.)

REG. v. BLACKBURN. (a)

*Embezzlement—Time of appropriation—Secretary of a Trades-Union Society—Russell Gurney's Act (31 & 32 Vict. c. 116).*

*The act to amend the law relating to embezzlement, so as to include the offence committed by one of two or more partners, or beneficial owners, came into operation on the 31st day of July, 1868. In the month of July, the prisoner went out of office as secretary of No. 3 Lodge of the Operative Bricklayers' Society, and failed to hand to his successor the ascertained balance of moneys which should have been in his possession. He was summoned to attend the lodge and account for the moneys on the 1st day of August, 1868. He did not do so, but absconded, and was apprehended at Lowestoft several weeks afterwards :*

*Held, that if the prisoner appropriated the money before the 31st of July he could not be convicted, but that the jury were entitled to look at the date of the meeting to which the prisoner was summoned, and to the date of his absconding, as indications of the date of the appropriation.*

*Upon the question, whether the cited act can be construed retrospectively as being an act which applies only to the practice and procedure of courts of justice, the Common Serjeant (after consulting Baron Cleasby) expressed his opinion that it could not be so construed.*

**W**ILLIAM BLACKBURN, fifty-three, bricklayer, was indicted for that he, on the 1st of August, being one of the joint beneficial owners of moneys belonging to Joseph Derry and others, received 17l. 3s. 0½d. on their account, and feloniously did steal the same.

*Besley* (instructed by Messrs. Shaen and Roscoe) appeared for the prosecution.

The prisoner was undefended.

(a) Reported by EDWARD T. BESLEY, Esq., Barrister-at-Law.

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*Besley* said, that this was the first prosecution under an act of Parliament which was passed in the last session at the instance of the Right Hon. Russell Gurney, the Recorder of London, and known as "The Larceny and Embezzlement Act." It was passed on the 31st of July, and he might say that the prosecution in this case was not taken so much for the sake of punishing the prisoner, as for the purpose of enlightening the persons who were members or officers of trades-union societies as to the law upon the subject. The learned counsel then explained the reasons why the Recorder's Act was passed, and said that in 1855 an act was passed which gave the power of summary conviction for embezzlement by officers of trades unions, in the same way as in cases where officers of friendly societies misapplied their funds. In January, 1867, a point was raised by a case stated for the opinion of the Court of Queen's Bench (*Hornby v. Close*, 2 Law Rep. Q. B. 159 ; 10 Cox Crim. Cas. 893 ; 15 L. T. Rep. 563), as to whether trades-union societies were entitled to this summary power, and, after a very full discussion, the Judges held they were not so entitled ; and the opinion then prevailed amongst officers of the trades unions generally that by this decision they could embezzle the moneys of a union with impunity ; that they, in fact, could take the funds, and set the members at defiance. The question was afterwards a little cleared up by a decision of Mr. Justice Lush, in a case where an officer of a society was charged with forgery : (*Reg. v. Dodd*, 18 L. T. Rep. N. S. 89.) The learned Judge ruled that the question of property did not arise, and that a conviction could follow. This decision led to a curious result, that whilst an officer of a trades union could be found guilty of forgery, he could not be convicted of embezzlement ; and for this reason, that he was supposed to have a property in the moneys which he had embezzled ; that was to say, that a trades union being a partnership body, in which every member was in precisely the same relation one to the other, any officer who might choose to embezzle the funds was in reality stealing only that which belonged to himself in common with the others, and therefore could not be convicted or punished. To remedy this defect then it was that the learned Recorder brought in a bill in the last session intituled "An Act to amend the Law relating to Larceny and Embezzlement ;" and, strange as it might appear, still it was true, that during the late election questions were asked of the candidates all over the country whether they would support such a bill. From this it would appear that the existence of the Recorder's Act was not generally known, for members and would-be members not only discussed the subject, but gave numerous promises to support such a bill when introduced into Parliament. The act was simplicity itself, and the clause under which the present prosecution was instituted was as follows :—"If any person, being a member of any copartnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or

embezzle any such money, goods, or effects, bills, notes, securities, or other property, of or belonging to any such copartnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership or one of such beneficial owners."

The working classes had a perfect right to combine together for trade purposes, and this was the opinion of many eminent men of the present day, amongst others Earl Granville and the Right Hon. Mr. John Bright, and now, according to law, no officer of a trades union could steal or misapply its funds without being liable for the consequence should a prosecution follow. In this case a question certainly might arise—and he wished to state this, seeing that the prisoner was not defended by counsel—whether the embezzlement had or had not taken place before the Recorder's Act was passed. It might be contended that, inasmuch as all acts of Parliament which affected only the procedure and practice of courts of justice were to be construed retrospectively, though the embezzlement was prior to the 31st of July, 1868, the prisoner could be convicted under this act; but, in this case, he thought that question would really not arise, because the prisoner was called upon to account on the 1st of August, and if he had then paid the money would not have been prosecuted. The prisoner subsequently absconded, and they might well believe that it was then he converted the society's moneys to his own use, which would clearly be an offence under this act.

The COMMON SERJEANT said that, with regard to construing this act of Parliament retrospectively as applying only to the practice and procedure of courts of justice, he certainly disagreed, though he concurred with Mr. Besley in his last proposition.

*Besley* said that the case for the prosecution was, that they were entitled to hold that the time of appropriation was when the prisoner absconded in August last, and the jury would see, by the evidence he was about to call before them, and by the statement of the prisoner himself, that he had clearly brought himself within the terms of the act of Parliament.

The following evidence was then called:—

Mr. Joseph Derry sworn, said:—I live at 19, Herbert-street, Great Cambridge-street, Hackney-road. I am secretary to Lodge No. 3 of the Operative Bricklayers' Society, held at the Ship public-house, Boundary-street, Shoreditch. I have held that office for seven or eight years past. By the minutes of the meeting held on the 21st of December, 1867, the prisoner was appointed treasurer for three months, and in March, 1868, he was again appointed. On the 27th of June he left that office. At the time the balance was handed to the prisoner by the former treasurer, Alfred Sorrell. I was present. That was on the 4th of January, 1868. When he left the office the accounts were made up to the 1st of July by the auditors. The balance was made up to 17l. 3s. 0½d. money of the society in his hands. The sums

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were got from the materials supplied by himself. He never objected to the amount. It was his duty on the following Saturday to have handed over the money to the new treasurer. On the next meeting night the new treasurer was there, but the prisoner did not come. I then wrote a letter to him, of which I have a copy. I sent it to him at 87, Mape-street, Bethnal-green-road; that had been his address for eight or ten months previously. On the next meeting night, the 11th of July, he failed to attend, and two of the members, named William Chase and William Ivory, were directed to see him. From the 11th of July to the present time I have attended every meeting, and the prisoner has never done so. On Sunday, the 12th, I saw the prisoner in the Bethnal-green-road, near his home. I wanted to get a time from him to come and settle his affairs. He named Tuesday, the 14th of July, at my house. I was there, and waited for him, but he never came. On the 30th of July I sent a letter to him at the same address, calling upon him to attend on the 1st of August, but he failed to appear. I went afterwards to his address. I saw his wife. He was not there, and I did not see him again until he was in custody.

Mr. William Chase, on oath, said :—I live at 4A, Cole Harbour-street. I am a bricklayer, and a member of this society. On the 11th of July last I and a person named Ivory saw the prisoner about the money. I told him that the members were very uneasy about the matter, as he had not attended to give up his books and the money. He said he had heard that the members had been making a noise about it, and now he should take his own time to pay it. He said he had got the money and would pay it all, but was short of a few pounds and had made use of it. I wanted him to come with me to the lodge then, but he refused, and appointed the next Saturday to go there, and promised that he would then hand over what money he had. He never went to the lodge as he had promised.

Police-constable Fairall deposed to apprehending the prisoner, on the 21st of November, in a skittle-alley, at the York Hotel, Lowestoft. He said the amount was all right, with the exception that it was 1*l.* too much. On the way to London he admitted the correctness of the balance, and when before the magistrate said that he had misapplied some of the money, and had been unfortunate enough to lose the remainder. He should like to pay every farthing of it back if he could.

In answer to the jury, Mr. Derry said that the prisoner was in receipt of a salary as treasurer. A small amount was now owing him.

The prisoner said that when the accounts were audited he had a balance of 24*l.*, out of which he had the officers to pay.

The COMMON SERJEANT then summed up the case to the jury, and referred to the law as it existed before July last, by which the officers of trades unions could not be convicted of embezzlement, they being supposed to have the same share in the funds

as the other members. The Recorder's Act remedied this state of things. The prisoner had admitted the correctness of the balance, and if any salary was due to him it was his own fault that he had not received it. It was clearly established that he had received 17*l.* odd, the money of the society; that he had not transferred it as he ought to have done, but had misused it and absconded. To these facts there appeared to be no answer. If the jury were of opinion that he had received the money, and had determined not to pay it back to the society, but had absconded, their duty would be to find the prisoner guilty of the charge; if they entertained a reasonable doubt, they must acquit him.

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In answer to the jury, the COMMON SERJEANT said that if they were of opinion that the larceny was not complete before the 1st of August, then the act would apply. If they thought that the embezzlement took place before the act was passed, then it would not apply. The absconding of the prisoner might throw some light upon the date of the appropriation.

The prisoner was found guilty.

The COMMON SERJEANT (who had retired to consult Baron Cleasby) said that the learned Judge agreed with him that the act was not one which affected the practice and procedure of courts of justice only. If the jury had been of opinion that the embezzlement had taken place before the passing of the act, there must have been an acquittal. In sentencing the prisoner, his Lordship said that he had been convicted on the clearest evidence of a very serious offence. When a number of men, as poor as himself, earning their living by their daily labour, chose to lay by a certain portion of those earnings for the purpose of meeting the necessities of their deserving brethren who, by reason of the loss of work, by sickness, or by accident, were compelled to seek assistance for themselves and their families, it was a cruel thing indeed if any officer of their society should rob them, as the prisoner had done. Such conduct as his, if allowed to pass unpunished, might be the means of crippling a society which was undoubtedly doing much good, of bringing discredit upon the members, and of discouraging them and others in those acts of providence which were a credit to so many of the working classes in this country. The sentence of the Court was

*That he be imprisoned and kept to hard labour  
for six calendar months.*

## COURT OF QUEEN'S BENCH.

May 8, 1868.

(Before BLACKBURN, C.J., MELLOR, J., and LUSH, J.)

REG. v. EYRE.(a)

11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85—11 & 12 Vict. c. 42, ss. 2, 17, 20, 25—*Offences committed by public servants, &c., beyond seas under—Summary jurisdiction of magistrates—Taking of depositions.*

*By the stats. 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, offences committed by governors of colonies and others in the public service in places beyond seas may be "prosecuted or inquired of, and heard and determined in His Majesty's Court of King's Bench here, in England, either upon an information exhibited by his Majesty's Attorney-General, or upon an indictment found."*

*By sect. 2 of 11 & 12 Vict. c. 42, "in all cases of crimes or offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales," any one or more of the justices for the place in which the person charged resides may issue a warrant to apprehend and have him brought before them to answer the charge, and be dealt with according to law. And by sects. 17 and 20 the justice or justices may bind over the witnesses to appear at the next "court of oyer and terminer, or gaol delivery, &c.," to give evidence:*

*Held, that these provisions of 11 & 12 Vict. c. 42, applied to proceedings on charges under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, and that a magistrate of the county within which the accused person resided was bound to investigate such charges.*

*The Court of Queen's Bench, in trying offences under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, is included within the general words "court of oyer and terminer" in sect. 20 of 11 & 12 Vict. c. 42.*

**R**ULE calling upon James Vaughan, Esq., one of the metropolitan police magistrates, sitting at the Bow-street police court, and Edward John Eyre, Esq., to show cause why a

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



writ of *mandamus* should not issue directed to the magistrate, commanding him to hear the evidence on certain charges preferred against Mr. Eyre, on the 22nd of April, 1867, on the prosecution of Peter Alfred Taylor, Esq., and to proceed therein according to law.

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It appeared from the affidavits that while Mr. Eyre was within the jurisdiction of the police courts of the metropolis, application was made by Mr. Taylor to the magistrate previously mentioned for a warrant or summons against Mr. Eyre, directing him to appear at the police court to answer certain charges to be preferred against him for offences alleged to have been committed by him against the provisions of 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, that is to say, among other things, for issuing an oppressive and illegal proclamation.

Mr. Vaughan, thereupon, issued two summonses as prayed, and on the 22nd of April Mr. Eyre appeared at the police court in obedience to these summonses. Mr. Taylor, upon whose information the summonses had been issued, was also in attendance with the witnesses for the prosecution, who were prepared to give evidence in support of the charges. Mr. Vaughan then stated that since granting the summonses his attention had been directed to the 11 & 12 Vict. c. 42, s. 20; that the trial provided for by the statute must take place in the Queen's Bench; and that he (Mr. Vaughan) had no power to bind over the prosecutor or witnesses to appear at the Court of Queen's Bench, or at any other place except at the next court of oyer and terminer and gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused was to be tried; and that the Court of Queen's Bench was not one of these courts; and that he had therefore no power to bind over any of these parties to the Court of Queen's Bench; that by 11 & 12 Vict. c. 42, s. 22, the recognisances, depositions, and so forth, were directed to be delivered to the proper officer of the court in which the trial is to be had, who in this case would be the officer of the Queen's Bench, so that if he proceeded to hear the case, and should be satisfied that there was a *prima facie* case against the defendant, he (Mr. Vaughan) would have to bind over the witness and prosecutor to go to the Central Criminal Court, while the depositions and recognisances, and all the statements that were made before him, would have to be sent to the officer of the Court of Queen's Bench; that by sect. 25 in the case of an indictable offence committed on land beyond the seas, the justice, if he thought proper to commit, would have to commit to the common gaol of the county; that the common gaol of the county of Middlesex is Newgate, and therefore, if Mr. Eyre were committed for trial without bail, he would be sent to Newgate; and on the sessions of the Central Criminal Court being held, as no indictment could be preferred there, he would be at once discharged, and he (Mr. Vaughan) had therefore come to the conclusion that he had no jurisdiction in the matter.

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The counsel for the prosecution called the attention of the magistrate to the words of 42 Geo. 3, c. 85, s. 1, and 11 & 12 Vict. c. 42, s. 2, and contended that reading these sections with sect. 25 of the last-mentioned act, it was the duty of the magistrate, if he was satisfied that there was a *prima facie* case, to commit Mr. Eyre to the common gaol of the county in which he (the magistrate) had jurisdiction, there to be safely kept until delivered in due course of law, which would be by his trial in the Court of Queen's Bench, which was a court of oyer and terminer, and such a court as described in the sections referred to. It was also contended that sect. 20 of the same statute did empower the magistrate to bind over the witnesses to appear at the Court of Queen's Bench, being a court of oyer and terminer, applicable to the trial of this particular offence, but that even if the Legislature had inadvertently omitted to give power to the magistrate to bind over the witnesses to appear at the trial, it would not relieve the magistrate from the duty imposed upon him by sects. 2 and 25, to commit the accused for trial. That the Court of Queen's Bench was the highest court of oyer and terminer for the whole of England, including, of course, the county of Middlesex; and that, although other courts of oyer and terminer had been established, the jurisdiction of the Queen's Bench had not been interfered with, and it was, therefore, still a court of oyer and terminer for the county of Middlesex.

The magistrate, however, declined to proceed to hear the evidence, and it was arranged that the summons should stand adjourned till the 4th of May, in order that application for a *mandamus* might be made to the Court of Queen's Bench.

The above-mentioned rule was accordingly obtained.

*Powell*, Q. C., now showed cause against the rule for a *mandamus*, and contended that the magistrate had no jurisdiction in the matter. The proceedings are instituted under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85. The 11 & 12 Will. 3, c. 12, after reciting that "A due punishment is not provided for several crimes and offences committed out of this, his Majesty's realm of England, whereof divers governors, lieutenant-governors, deputy-governors, or commanders-in-chief of plantations and colonies within his Majesty's dominions beyond the seas, have taken advantage, and have not been deterred from oppressing his Majesty's subjects within their respective governments and commands, nor from committing several other great crimes and offences, not deeming themselves punishable for the same here, nor accountable for such their crimes and offences to any person within their respective governments and commands," enacts that, "if any governor, lieutenant-governor, deputy-governor, or commander-in-chief of any plantation or colony within his Majesty's dominions beyond the seas, shall, after the first day of August, 1700, be guilty of oppressing any of his Majesty's subjects beyond the seas, within their respective governments or commands, or shall be guilty of any other crimes or offences, contrary to the laws of this realm,

or in force within their respective governments or commands, such oppressions, crimes, and offences shall be inquired of, heard, and determined in His Majesty's Court of King's Bench here in England, or before such commissioners and in such county of this realm as shall be assigned by his Majesty's commission, and by good and lawful men of the same county, and that such punishments shall be inflicted on such offenders as are usually inflicted for offences of like nature committed here in England." Sect. 1 of 42 Geo. 3, c. 85, provides, "That from and after the passing of this Act, if any person who now is, or heretofore has been, or shall hereafter be employed by, or in the service of his Majesty, his heirs or successors, in any civil or military station, office, or capacity, out of Great Britain, shall have committed, or shall commit, &c., any crime, misdemeanor, or offence in the execution, or under colour, or in the exercise of any such station, office, capacity, or employment as aforesaid, every such crime, &c., may be prosecuted or inquired of, and heard and determined in His Majesty's Court of King's Bench here in England, either upon an information exhibited by his Majesty's Attorney-General or upon an indictment found; in which information or indictment such crime, &c., may be laid and charged to have been committed in the county of Middlesex; and all such persons so offending, and also all persons tried under any of the provisions of the said recited act, passed in the reign of King William aforesaid, or this act, or either of them, for any offence, &c., and not having been before tried for the same in Great Britain, shall on conviction be liable to such punishment as may by any law or laws now in force, or any act or acts that may hereafter be passed, be inflicted for any such crime, &c., committed in England, and shall also be liable, at the discretion of His Majesty's Court of King's Bench, to be adjudged to be incapable of serving his Majesty in any station, office, or capacity, civil or military, or of holding or exercising any public employment whatever." The words "prosecuted or inquired of, and heard and determined" have received a judicial construction in *Rex v. Ruck* (1 Russ. C. & M. 827). "The words 'dealt with' apply to justices of the peace; 'inquired of' to the grand jury; 'tried' to the petty jury; and 'determined and punished' to the Court:" (per Lord Wensleydale, quoted 1 Russ. on Crimes, 757.) The mode of proceeding pointed out by 42 Geo. 3, c. 85, is either by information exhibited by the Attorney-General, or upon indictment found. There has never yet been an attempt to bring an offender under those statutes before justices of the peace. [BLACKBURN, J.—It is not likely that there should have been, seeing there have been only two or three cases under the statutes.] Then the act 11 & 12 Vict. c. 42 is not an act extending the powers of justices, but only regulating the exercise of their powers. It is entitled, "An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with Respect to Persons charged with indictable Offences;" so

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that, if justices could not investigate a case of this nature before that act, they are not enabled to do so by it. Sect. 2 provides that "in all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the Admiralty in England have or claim to have jurisdiction, and in all cases of crimes or offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales, it shall be lawful for any one or more of Her Majesty's justices of the peace," &c. That refers, I submit, to the several previous statutes, making offences committed by governors and others beyond seas triable in England. Sect. 20 enacts "that it shall be lawful for the justice or justices before whom any such witness shall be examined as aforesaid to bind by recognisance the prosecutor and every such witness to appear at the next court of oyer and terminer, or gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused," &c. Though the Court of Queen's Bench is a court of oyer and terminer, it could not have been intended to include it within those general words here, any more than it could be held to be included in a general enactment as to coroners' courts, though the Queen's Bench is a court of coronage, and the Chief Justice the chief coroner of the realm. The "Court of Queen's Bench" is a distinctive appellation, and it cannot be held to be included under the general words "court of oyer and terminer." Where the Court of Queen's Bench is intended to be included, it is mentioned expressly, as in 59 Geo. 4, c. 69, s. 4, which enacts "that all such offences which shall be committed within that part of the United Kingdom, called England, shall and may be proceeded and tried in His Majesty's Court of King's Bench, at Westminster, and the venue in such case laid at Westminster, or at the assizes or session of oyer and terminer and gaol delivery, or at any quarter sessions of the peace in and for the county or place where such offence was committed." [BLACKBURN, J.—That does not mention a "court" of oyer and terminer, but the "assizes or session" of oyer and terminer. LUSH, J.—If the Court of King's Bench had not been expressly mentioned there, the offence could only be tried at the "assizes" of oyer and terminer.] The words "at the next" court of oyer and terminer, in sect. 20 of 11 & 12 Vict. c. 42, are opposed to the interpretation which would include the Court of Queen's Bench, as its sittings are in a manner continuous, whilst the sittings of ordinary courts of oyer and terminer are intermittent. [LUSH, J.—The Court of Queen's Bench sits only during term time.] If the magistrate belongs to any other county than Middlesex, he must commit the accused to the common gaol of that county, by sect. 25 of 11 & 12 Vict. c. 42. [LUSH, J.—Would not the common law enable him to be

brought up thence by *habeas corpus*? BLACKBURN, J. referred to the alteration in the jurisdiction of magistrates effected by 7 Geo. 4, c. 64.] 4 Steph. Black., 441, 442, referred to. [LUSH, J.—The 2nd section of Jervis's Act clearly intended that some magistrate or other should have power to commit for every indictable offence. Is your argument this, that no magistrate can commit for the offence charged in this case?] That section applies only to indictments which could legally be preferred in the then existing state of the law. [MELLOR, J.—The 2nd section of Jervis's Act did not intend to oust any case, although it may be held to have done so without intending it.] It did not intend to include that which was not included in the then existing state of the law. The present case may have been a *casus omissus*, or it may have been deliberately omitted by the Legislature, as the acts under which the present proceedings are taken were aimed at very high functionaries—viceroys, governors, and such like—and it may have been thought that they should not be brought before the inferior magistrates, as inferior offenders are. [MELLOR, J.—If it were intended to exclude their case, I think there would have been words to that effect. BLACKBURN, J.—And it is contemplated by the act that depositions might be taken before the magistrate in favour of the accused, as well as for the prosecution. LUSH, J.—And if construing a provision of an act of Parliament in the widest sense is in favour of the accused, that is a reason why we should so construe it.]

Sir R. Collier, Q. C. (with whom were *Fitzjames Stephen*, Q. C., and *J. Horne Payne*) on the other side, were not called on.

BLACKBURN, J.—I think we need not trouble the other side. It is clear the rule must be made absolute, *i. e.*, that the magistrate must investigate the case, and if after investigation he thinks the case a proper one to return for trial in this Court, then he must take and return the depositions to the proper officer. The question depends entirely upon the extent of the jurisdiction of justices of the peace. Their jurisdiction was limited at the first to a particular district named in the commission, but it was afterwards extended. The act of 1 & 2 Phil. & M. c. 13, s. 4, provided that where any prisoner was brought before them for any manslaughter or felony, before any bailment or mainprise, they “shall take the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof, and the same or as much thereof as shall be material to prove the felony, shall put in writing, before they make the same bailment; which said examination, together with the said bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission.” This enactment not extending to prisoners by the justices “committed to ward for the suspicion of such manslaughter or felony and not bailed, in which case the examination of such prisoner, and of such as shall bring him, is as necessary, or rather more than where such prisoner shall be let to bail or mainprise,” it was enacted by the

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2 & 3 Phil. & M. c. 10, s. 2, that "from henceforth such justice or justices before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the felony, shall put in writing within two days after the said examination, and the same shall certify in such manner and form, and at such time as they should and ought to do, if such prisoner so committed or sent to ward had been bailed or let to mainprise," &c. And it further enacts "that the said justices shall have authority by this act to bind all such by recognisance or obligation as do declare anything material to prove the said manslaughter or felony against such prisoner as shall be so committed to ward, to appear at the next general gaol delivery to be holden within the county, city, or town corporate when the trial of the said manslaughter, or felony shall be, then and there to give evidence against the party," &c. Then comes the act of 7 Geo. 4, c. 64, s. 2, which, after reciting the expediency of amending and extending the provisions of the two former acts, enacts, "that the two justices of the peace, before they shall admit to bail, and the justice or justices before he or they shall commit to prison any person arrested for felony, or on suspicion of felony, shall take the examination of such person and for information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognisance all such persons as know or declare anything material touching any such felony or suspicion of felony to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great session or sessions of the peace at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments, and recognisances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court." And sect. 3 contains like provisions where the charge is not of a felony, but "of misdemeanor or suspicion thereof." These provisions are re-enacted by 11 & 12 Vict. c. 42, sect. 2 of which enacts "that in all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the Admiralty of England have, or claim to have, jurisdiction, and in all cases of crimes or offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales, it shall be lawful for any one or more of Her Majesty's justices of the peace for any county,



riding, division, liberty, city, borough, or place within England or Wales in which any person charged with having committed, or with being suspected to have committed, any such crime or offence shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant to apprehend the person so charged, and to cause him to be brought before him or them, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place to answer to the said charges and to be further dealt with according to law." It is contended that that enactment does not apply to cases of misdemeanors committed by governors beyond seas, which can be tried only in the Court of Queen's Bench; but no satisfactory reason has been urged in support of that contention. I think it clearly does apply to such cases. Then the 20th section makes it lawful "for the justice or justices before whom any such witness shall be examined as aforesaid, to bind by recognisance the prosecutor and every such witness to appear at the next court of oyer and terminer, or gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused is to be tried then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, &c.; and the several recognisances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognisance of bail (if any) in every such case shall be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice who is to preside in such court at the said trial shall order and appoint." Though the Court of Queen's Bench is a court of oyer and terminer, and though such a charge as the present must be tried by that Court sitting as a court of oyer and terminer, yet it is said that this enactment does not extend to the Court of Queen's Bench, because it is not expressly named. No such rule of construction is to be applied. It is always an oppressive proceeding to prefer an indictment *ex parte* before a grand jury, and therefore the Legislature has made a rule that the parties shall go before a magistrate, and that depositions shall be there taken. The object of the statute of Geo. 4 is as applicable to cases which are to be tried in the Queen's Bench as to any other cases; and I think the magistrate is bound in the present case to hear and determine the matter brought before him.

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MELLOR, J.—I am of the same opinion. The act of 42 Geo. 3, c. 85, s. 1, provides that offences committed by any person in the civil or military employment of the Sovereign out of Great Britain "may be prosecuted, or inquired of, and heard and determined in His Majesty's Court of King's Bench here in England, either upon an information exhibited by his Majesty's Attorney-General, or upon an indictment found." Mr. Eyre is,

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as I understand, charged before Mr. Vaughan with certain indictable offences under this statute. But it is said that though this is so, and though he may be tried in the Court of Queen's Bench as a court of oyer and terminer, yet he is not to have the advantage of those statutes which have been made for the benefit of the accused, particularly the act of 11 & 12 Vict. c. 42, which enacts in sect. 2 that "in all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, &c., and in all cases of crimes or offences committed on land beyond the seas, for which an indictment may legally be preferred in any place within England or Wales, it shall be lawful for any one or more of Her Majesty's justices of the peace for any county, &c., in which any person charged with having committed, or with being suspected to have committed, any such crime or offence, shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant to apprehend the person so charged, and to cause him to be brought before him or them . . . to answer to the said charges, and to be further dealt with according to law." I feel great difficulty in seeing anything which would prevent this enactment from applying to such offences as Mr. Eyre is charged with as well as other indictable offences. I see no reason to hold that he is to be deprived of that benefit. The reason of the thing, as well as the language of the enactment, lead us to hold that the magistrate must hear the case, and then exercise his discretion with regard to it.

LUSH, J.—The only question before us is whether the magistrate has jurisdiction to entertain the charge, the magistrate being in the county in which the accused is found to be, and the offence being one which under the statute can only be heard and determined in this Court. The magistrate very properly referred this matter to us. However, I think upon the construction of the statute that no real doubt exists. It would be, to my mind, extraordinary if a person accused in such a case as the present should be held to be excluded from the application of a statute which was intended for the benefit of the accused. When I look at the 2nd section of 11 & 12 Vict. c. 42, an act which consolidates the preceding enactments on the same subject, I find that it is the expressed intention of the Legislature to include "all cases of indictable crimes or offences of any kind or nature whatsoever" committed out of England. That section is as wide in its terms as it well can be. [His Lordship read the section at length.] The present charge is one of a crime committed on land beyond the seas, for which an indictment may legally be preferred in a place in England, *i.e.*, in the Court of Queen's Bench. Therefore, it is one precisely within the application of the act. Then sect. 25 provides "that when all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice or justices of the peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justice or justices shall forthwith order

such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place to which by law he may now be committed, or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned." And the 20th section embraces what the acts of Geo. 4 and of Philip and Mary contained before on the subject of binding over the witnesses to prosecute. The provisions of the enactments therefore enable the magistrate to admit the accused party to bail, to dismiss the charge against him, or to commit him for trial; and I do not see the least difficulty in carrying all this out.

*Rule absolute.*

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## COURT OF QUEEN'S BENCH.

*April 30, 1868.**(Before COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and  
HANNEN, J.)*

REG. v. THE JUSTICES OF WESTMORELAND.(a)

*Quarter sessions—Adjournment of business—Adjourning over an  
intermediate sessions.**When a matter is properly before the Justices at quarter sessions,  
they have a general power to adjourn the consideration of it to a  
subsequent sessions, and such subsequent sessions need not be the  
sessions next following.**Presentments having been made at the Epiphany Sessions under  
sect. 24 of the 28 & 29 Vict. c. 126 (Prisons Act) as to the  
repairs of two of the county prisons, due notices, &c., were  
published that such presentments would be taken into consideration  
at the ensuing Easter Sessions. At such sessions accordingly the  
presentments came on for consideration, and a committee was  
appointed to consider the whole subject and report to the Michael-  
mas Quarter Sessions, and the consideration of the report was  
adjourned till then. At such Michaelmas Sessions the committee  
brought up a report, and a resolution was moved and carried  
thereupon :**Held, that the Easter Quarter Sessions had power to adjourn the  
consideration of the question to the Michaelmas Sessions, and that  
no fresh notices were necessary with reference to such last-  
mentioned sessions.*

**T**HIS was a rule calling upon the Justices for Westmoreland to show cause why a writ of *certiorari* should not issue directed to them to remove into this Court an order of Sessions made by them at the Quarter Sessions held on the 17th of October, 1867, ordering that the gaol at Appleby be altered and adapted in accordance with the provisions of the new Prisons Act, and that sufficient cells be provided for the reception of the whole of the prisoners within the county.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

It appeared that at an adjourned Epiphany Quarter Sessions for the county of Cumberland, held at Kendal on the 22nd of February, 1867, a presentment was duly made against each of the two county prisons at Appleby and Kendal upon the ground that the provisions of the Prisons Act, 1865, could not be carried out according to the then existing arrangements, and that it was necessary either to build a new prison for the county, or to materially alter the house of correction at Kendal; and a recommendation for altering the said prison at Kendal was accordingly submitted. An order of sessions was thereupon made that the said presentments should be taken into consideration at the Easter Quarter Sessions to be holden at Kendal on the 11th of April then next. All due advertisements and notices were inserted and given pursuant to sect. 24 of the said Prisons Act, that the prison authorities of the said county would on the said 11th of April take the said presentments into consideration. At the Easter Quarter Sessions, held on the said 11th of April, the consideration of the said presentments was taken and entertained, when it was resolved, "that a committee be appointed to consider the gaol question, to consult the Government, and to report to the Michaelmas Quarter Sessions upon the expediency of having one or two gaols, and that the committee consist of the following justices." (The justices were then named.) Such adjournment was not recorded, as such a substantive record was not customary at the sessions when a report was to be made. That these proceedings and resolutions were then and there by special adjournment continued to the Michaelmas Quarter Sessions, 1867. That the said committee duly made their report at the said Michaelmas Quarter Sessions, and a majority recommended that the gaol at Appleby should be altered to meet the requirements of the Prison Act, which report was by a resolution of the sessions carried, and a committee was appointed to carry it out, and it was this resolution which was, in fact, the order sought to be removed by the writ of *certiorari*.

By sect. 24 of the 28 & 29 Vict. c. 126 (Prisons Act) it is enacted that "the necessity for any alteration or enlargement or for rebuilding of any existing prison . . . shall be proved in the case of a municipal borough by the certificate of the recorder, or chairman of quarter sessions where there is no recorder, and in any other case by presentment of two or more of the visiting justices, or other justices having jurisdiction within the district of the prison authority; and the consideration of such certificate or presentment shall not be entertained by the prison authorities, unless not less than three weeks' previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority, of their intention to take the same into consideration at a time and place to be mentioned in such notice," &c.

*Maule*, Q.C. and *Fawcett* now showed cause, and contended that the proceedings of the Michaelmas Quarter Sessions were

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perfectly regular, for that it was quite competent to the sessions held in April to adjourn the question over the Midsummer Sessions, for as all the requisite legal notices had been given prior to the first sessions, no further notices were necessary: (*Reg. v. The Justices of Glamorganshire*, 5 T. R. 279; *Keen v. The Queen*, 10 Q. B. 928.)

*Manisty*, Q.C., and *Staveley Hill*, Q.C., in support of the rule, contended that the Quarter Sessions had no power to adjourn the consideration of the question over the Midsummer Sessions; that they can only adjourn from sessions to sessions; and that in consequence of passing over the Midsummer Sessions it was necessary that fresh notices should have been given under sect. 24 of the Prisons Act. They cited *R. v. The Justices of Sussex* (2 Bott. pla. 841); *R. v. Hedingham Sible* (2 Bott. pla. 821); *Bodmin v. Warligen* (2 Bott. pla. 825).

COCKBURN, C.J.—The rule in this case, I think, ought to be discharged. It appears that due notice had been given that the matter would be brought before the Court of Quarter Sessions, and when so brought the Court resolved that it should be referred to the consideration of a select committee, who were directed to report upon it at the next Michaelmas Sessions. Now it is contended that, the Midsummer Sessions having been passed over, new notices were necessary before the matter could be entertained at the Michaelmas Sessions, as it is said that each of these sessions is a separate and independent Court. It would lead to very great inconvenience if there was not an inherent power in the Court of Quarter Sessions to adjourn the consideration of business properly brought before them to such time as they think they will be in a better position to decide upon it. It may be so with reference to some peculiar matters; but in respect of a matter like this, properly before the court, I think fresh notices were not necessary. As an illustration of this view, take the 17 Geo. 2, c. 28, s. 4, which provides that an appeal against a poor-rate must be to the next general or quarter sessions of the peace. The practice that has existed and been sanctioned from that date down to the present time by all Courts of Quarter Sessions and by this Court if the grievance arises before the holding of the Court of Quarter Sessions to which the appeal should be made, and if there be not time to give the necessary notice of appeal, is to enter and respite the appeal to the next quarter sessions, at which the court becomes seised of it and deals with it, although the statute has expressly enacted that the appeal must be to the next court of general or quarter sessions after the grievance has arisen. It is clear that a matter brought before the court may be adjourned; but it is said that, although the Court may have a right to adjourn its consideration from one sessions to the next, it has no power to adjourn it to the next but one. I think it does not matter to which sessions the adjournment is made, whether it is to the next court or to some future court, if it be more convenient that it should be to some



future court. As to any supposed inconvenience arising from the Court of Quarter Sessions availing itself of such power to get rid of any matter, this Court would control its action and compel it to proceed with the matter if need be. *Rex v. The Justices of Sussex* (2 Bott. 770) is in point. In that case the Court of Quarter Sessions had, on the hearing of an appeal, ordered that a special case should be stated for the opinion of this Court, but the Court had adjourned before the counsel had settled the case. This Court said: "When the Justices have said that a special case shall be made, they virtually say that the cause shall be adjourned over till a case is made; and therefore the want of an adjournment or a respite is merely the omission of the clerk, and may at any time be supplied." Therefore, when the sessions, instead of proceeding to dispose of the matter in question, directed that it should go to a committee to consider and report upon it at the next Michaelmas Sessions, that amounted to the adjournment of it until the next Michaelmas Sessions. I was somewhat struck by the argument that the adjournment was not in terms for the consideration of the question, but merely for the consideration of the report; but it was virtually the adjournment of the entire question. All was done that was required by the stat. 28 & 29 Vict. c. 126, s. 24, and the Justices present at the Easter Sessions had notice that the whole matter was adjourned to the Michaelmas Sessions, and then it was taken into consideration.

BLACKBURN, J.—I am of the same opinion. Before the consideration of the presentment by the prison authorities three weeks' notice is to be given. In this particular case the prison authorities were the Court of Quarter Sessions, and notice was duly given in the newspapers three weeks before the Easter Sessions in the first instance of the intention to entertain the consideration of the presentment. The sessions did then entertain the consideration of the presentment, but they did not dispose of it at those sessions. It is obvious enough that if the Court of Quarter Sessions, being the prison authority, had adjourned the consideration of it over two or three days, continuing the same sitting, it would not have been necessary to give a fresh notice. The adjournment would be a sufficient notice to all persons to come to any adjournment of the court. The Court of Quarter Sessions is a court under one commission, and holds its sittings four times a year; therefore, the first court, although it may adjourn, is simply continued; the next court is the same court. It has been held in *Keen v. The Queen* that although the sessions is not adjourned, yet if the matter is adjourned the new sessions may take up that new matter. In that case Pattison, J., said: "The sessions have only one commission, so it is quite correct for the Justices to adjourn a case from one sessions to another because they are not advised what judgment to give;" and Erle, J. pointedly says: "The sessions may adjourn the case, although the sessions itself is not adjourned." The question, therefore, is could the prison authority sitting at the first Court of Quarter Sessions adjourn the matter

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from themselves to the new court of quarter sessions? They may adjourn from one sessions to another any other matter, and I see no reason why they could not adjourn the consideration of these presentments. Then comes the question, what in effect have they done? I agree that if the prison authority, having entertained this matter, had allowed it to drop a new notice ought to be given, when they are about to resume it; but, if having entertained the matter they adjourn its further consideration to another sessions, I see no reason why they should not do so. Now, have they done so here? They passed a resolution that the matter should be referred to a committee to inquire and report, and that that report should be brought before them at the Michaelmas Quarter Sessions; that is, the next sessions but one. That was not an adjournment of the consideration of the matter in express terms; but, according to *Rex v. Sussex*, it was a virtual adjournment of the matter to the Michaelmas Sessions, and any person who had it brought to his notice by advertisement that this matter was going to be entertained at the Easter Sessions might have known that it was to be resumed at the Michaelmas Sessions. It was argued that although the sessions had power to adjourn from one sessions to another, yet the adjournment must be exclusively to the next sessions. No authority was cited for this argument, and certainly there is no enactment to that effect. I agree that it would be desirable to adjourn to the next quarter sessions. This is generally done, but where it would be necessary to get the opinion of a committee it was better to give ample time so that the matter should be done thoroughly, and it therefore became prudent to adjourn it for six months. Why should not the Court of Quarter Sessions, which is a continuing court, adjourning from one sessions to another, do so? Why should it be necessary that they should adjourn to the next quarter sessions? If the adjournment were made to prevent any further consideration of the matter it could easily be set right; but if it is a *bonâ-fide* adjournment, I see no reason whatever for saying that there is any strict rule of law which makes it void.

MELLOR, J.—I am of the same opinion. I think that we ought not to exercise our jurisdiction to quash this order of sessions. It is conceded that the jurisdiction of the sessions attached, and that notice was properly given for the Easter Sessions. Therefore at the Easter Sessions the Justices were in a condition to entertain the consideration of this matter, and they did entertain it. But, from want of necessary information which they thought might be useful to the ultimate determination of the matter, they referred the consideration of that question to a select committee. It was a convenient course to adopt unless some law prevents its being done. By the same resolution by which it was referred to the committee, it was resolved that the report should be made to the ensuing Michaelmas Sessions, passing over the intervening Midsummer Sessions. That in reality was an adjournment of the further consideration of the matter until the Michaelmas Sessions.

That is the substance of what was done at the Easter Sessions, and if so the Michaelmas Sessions were seized of the jurisdiction of the matter to be entertained at those sessions. I should be extremely unwilling to interfere on the ground of any supposed irregularity in the mode of conducting the business unless there was an excess of jurisdiction, or the matter had dropped by the omission to do something which ought to have been done to keep it alive. I think the Court had full power at the Michaelmas Sessions to entertain the question.

HANNEN, J.—I am of the same opinion. The 28 & 29 Vict. c. 126, s. 24, only requires that notice shall be given before the matter is entertained in the first instance, and no further notice would be required while it really remained under consideration. If the matter had dropped then, no doubt a fresh notice would have been necessary. But here the matter was not dropped. It remained under consideration by the reference to a committee which was appointed. It is suggested that there ought to have been an entry to this effect that the further consideration was adjourned until the later sessions. I can see no reason why in principle it should be so. There was, in fact, an entry which directed that the matter should stand over until after one intervening sessions had elapsed. The entry expresses as clearly as can be the intention that the matter should be taken up after it has had the further consideration given to it by the committee. In the absence of authority I think there is no reason in support of the objection.

*Rule discharged.*

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## COURT OF CRIMINAL APPEAL.

November 14, 1868.

(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and LUSH, JJ.)

REG. v. JOSEPH DIXON.(a)

*Embezzlement—Servant or agent.*

*Prisoner was engaged by U. at weekly wages to manage a shop. U. then assigned all his estate and effects to R., and a notice was served on prisoner to act as the agent of R. in the management of the shop. For fourteen days afterwards R. received from U. the shop moneys. Then the shop money was taken by U. as before. Prisoner received his weekly wages from U. during the whole time. Some time after a composition-deed was executed by R. and U., and U.'s creditors, under sect. 192 of the Bankruptcy Act, by which R. reconveyed the estate and effects to U.; but this deed was not registered until after the embezzlement charged against the prisoner :*

*Held, that prisoner was the servant of U. at the time of the embezzlement.*

CASE reserved for the opinion of this Court by the Chairman of the Court of Quarter Sessions for the County Palatine of Durham.

Joseph Dixon was tried before me at the last Michaelmas Quarter Sessions for the county of Durham for embezzling half a sovereign.

The indictment contained two counts: first, for embezzling half a sovereign, the property of Arthur Urquhart; secondly, for embezzling half a sovereign, the property of Robert Robinson.

Counsel for the prisoner applied that the prosecutor should elect, and I so decided, reserving power either to amend the name of the owner of the property if I had such power, or to grant a case on the point if necessary.

The prosecutor elected to proceed on the count for embezzling the half sovereign, the property of Arthur Urquhart.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

It was proved that prisoner was employed by Urquhart, at 20s. per week to manage a grocer's shop kept by him, he being himself a carpenter. REG.  
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On the 6th of April, 1868, Urquhart was in difficulties, and made an assignment of his goods, &c., to his brother-in-law, Robert Robinson, for the benefit of his creditors. For fourteen days Robinson received from Urquhart all the moneys received in the shop. 1868.  
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There was an execution in the hands of the sheriff against the goods of Urquhart; and to protect the property, the following notice was prepared by Robinson's attorney, and handed to prisoner with an explanation of its object:

"Under and by virtue of a certain deed of assignment, dated the 7th of April, 1868, and made between Arthur Urquhart, of Sunderland, in the county of Durham, grocer and provision merchant, of the one part, and Robert Robinson, of the same place, wholesale druggist and drysalter, of the other part, whereby the whole of the estate and effects of the said Arthur Urquhart were conveyed and assured to the said Robert Robinson absolutely, to be applied and administered for the benefit of the creditors of the said Arthur Urquhart. We, the undersigned, being the attorneys for the said Robert Robinson, do hereby authorise and empower you, as the agent of the said Robert Robinson, to take and keep possession of all the estate and effects of the said Arthur Urquhart which are now in or upon the dwelling-house, shop, and premises in Coronation-street, Sunderland, aforesaid, hitherto occupied by the said Arthur Urquhart. Dated this 8th April 1868.—Yours, &c.,

"GRAHAM and GRAHAM,

"Attorneys for the said Robert Robinson.

"To Mr. Joseph Dixon,

"Agent, Sunderland."

This paper was given up soon after the 21st of April by prisoner to Urquhart and destroyed.

After the fourteen days mentioned the money was taken by Urquhart as before; prisoner continuing to receive from Urquhart during the whole period his weekly wages.

Before the expiration of twenty-eight days the deed of assignment was registered, namely, on the 21st of April.

On the 6th of July, 1868, a composition-deed was executed by Robert Robinson and three-fourths of the creditors whose debts were 10*l.* and upwards, and Urquhart, reconveying the property to Urquhart. The instalments due under this deed had been paid. This deed was not registered until the 3rd of August.

On the 21st of July a marked half sovereign was sent to the shop by Urquhart through a strange hand; and on Urquhart returning to the shop and not finding it in the till, a policeman was called in, and the prisoner produced it, and admitted having taken it.

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I left the facts to the jury on the count laying the property as Urquhart's, and the jury convicted him.

It was contended on prisoner's behalf—

1st. That the notice appended vested the property in the prisoner, and inasmuch as the composition-deed was not registered until after the 21st of July, it never was taken out of him.

2nd. That the first deed vested the property in Robinson; that the notice served by Robinson's attorney never having been revoked by Robinson or any demand made for the half sovereign or for any money, and the composition-deed not having been registered until after the offence was committed, the half sovereign was Robinson's, and prisoner could not be convicted of embezzling Robinson's money under these circumstances.

I reserved these points on the understanding that if the Court held that the prisoner could not be convicted of embezzling Urquhart's money, but could be of embezzling Robinson's, the count was to be amended by substituting Robinson's name, or the count which stood originally in the indictment was to be restored if the Court thought I had the power to do either.

Prisoner was sentenced, but is now out on bail.

JOHN R. DAVISON, Chairman.

*Hopwood*, for the prisoner.—The prisoner was not the servant of Urquhart at the time of the embezzlement. Under the conveyance by Urquhart of all his estate and effects to Robinson and the notice to the prisoner, the prisoner became Robinson's servant, and continued so at the time of the embezzlement. The reassignment of the estate to Urquhart did not come into operation until registration of the deed, which took place after the embezzlement; and, besides, the prisoner had no notice of the reconveyance.

*Greenhow*, for the prosecution, was not called upon to argue.

BOVILL, C.J.—In this case there is no doubt. The facts, when understood, do not warrant the argument. Urquhart assigned all his estate and effects to his brother-in-law, Robinson, and notice of that was given to the prisoner. After that there was a reassignment of the property by Robinson to Urquhart, and upon that the property reverted in Urquhart. The prisoner was the servant of Urquhart receiving his wages from him, and the money embezzled was the property of Urquhart and of no other person. The indictment was therefore right.

The other Judges concurred.

*Conviction affirmed.*



## COURT OF CRIMINAL APPEAL.

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(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and LUSH, JJ.)

REG. v. ELIZA DAVIS.(a)

*False pretences—Evidence.*

*The indictment alleged that the prisoner was living apart from her husband under a deed of separation, and was in receipt of an income from her husband, and that he was not to be liable for her debts, yet that she falsely pretended to the prosecutor that she was living with her husband, and was authorised to apply for and receive from the prosecutor goods on the account and credit of her husband, and that her husband was then ready and willing to pay for the goods.*

*The evidence at the trial was that the prisoner went to the prosecutor's shop and selected the goods, and said that her husband would give a cheque for them as soon as they were delivered, and that she would send the person bringing the goods to her husband's office, and that he would give a cheque. When all the goods were delivered, the prisoner told the man who delivered them to go to her husband's office, and that he would pay for them. The man went, but could not see her husband, and ascertained that there was a deed of separation between the prisoner and her husband, which was shown to him. He communicated what he had learnt to the prisoner, who denied the deed of separation. The goods were shortly after removed and pawned by the prisoner. The deed of separation between the prisoner and her husband was put in evidence, by which it was stipulated that the husband was not to pay her debts; and it was proved that she was living apart from her husband, and receiving an annuity from him, and that she was also cohabiting with another man:*

*Held, that the false pretences charged were sufficiently proved by this evidence.*

CASE reserved for the opinion of this Court at the General Quarter Sessions of the Peace for the County of Surrey, on the 20th of October, 1868.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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*False pretences*  
— *Evidence.*

Eliza Davis was tried and convicted under the following indictment for obtaining goods by false pretences :—

The jurors, &c., present, &c., that Eliza Davis was living separate and apart from her husband, one Alfred Allen Davis, and was in receipt of a certain income, provided for the said Eliza Davis by her said husband, as and for her separate maintenance and support, and had voluntarily agreed with the said Alfred Allen Davis and certain other persons, to wit, Fanny Medland, then being trustee to a certain deed of separation between her and her said husband, that he, the said Alfred Allen Davis, should not be liable for the payment of any debts to be contracted by the said Eliza Davis after the execution of the said deed. And the jurors, &c., present, &c., that the said Eliza Davis, well knowing the premises, and being an evil-disposed person, and contriving and intending to cheat and defraud, on the 4th day of August, 1868, unlawfully and knowingly did falsely pretend to one James Michael Utton, a servant of one William Waine, that she, the said Eliza Davis, was then living under the protection and control of the said Alfred Allen Davis, that she, the said Eliza Davis, was then authorised to apply for and receive of and from the said William Waine divers goods to a large amount, to wit, to the amount of 115*l.* for and on the account and credit of the said Alfred Allen Davis; that the said Alfred Allen Davis was then ready and willing to pay for the goods which she, the said Eliza Davis, should obtain from the said William Waine, and that she, the said Eliza Davis, then wanted the said goods, for the purpose of furnishing a certain house, then being in the occupation of her said husband, by means, &c.

At the close of the case for the prosecution, it was objected, on behalf of the defendant, that none of the allegations in the indictment were legally supported by the following evidence given in that behalf by the said James Michael Utton :—

On the 4th of August last the female prisoner, Eliza Davis, called at Mr. Waine's shop. I served her. She selected goods to the amount of 115*l.* I then asked her to pay a deposit. She said, "It is a strictly cash transaction, my husband will give you a cheque as soon as the goods are delivered." I asked her name; she gave her name Mrs. Davis, 4, Caroline-cottages, St. Anne's-road, Brixton-road, and added, "As soon as you deliver the goods, I will send you to my husband's office, 10, Basinghall-street, and he will give you a cheque." She added, "My husband is an auctioneer, and you must serve me well, as he knows the value of the goods." The goods were delivered between the 4th and 11th of August. I let her have the goods on the representation that she was the wife of Mr. Davis, the auctioneer. On Tuesday, the 11th of August, I presented the bill to female prisoner. I asked her how I was to get the money. She said, "Go to my husband's office, 10, Basinghall-street, and he will pay you." I went there, but could not see her husband. From information there received, I went to Mr. Downing, solicitor, in Basinghall-street. He

showed me a deed of separation, and gave me further information. I returned to female prisoner. I told her I had been to the office, and they had repudiated all claim, and told me there was a deed of separation, and that she had been living, separate from her husband for four years. Prisoner said, "No; there is no such thing." I said, "Now are you sure you never signed anything which exonerates Mr. Davis from paying your debts?" She said, "No; never." She said further, "I will give you a letter to Mr. Downing, and he will pay you the money." She wrote a letter, and I took it to Mr. Downing, but did not obtain the money. I went back to prisoner the same day. She promised to call on Mr. Waine next morning (the 13th of August), at ten o'clock. She failed to come. I then went to 4, Caroline-cottages, and found the house shut up and deserted. I obtained admittance by borrowing the key of the next house, and found a portion of the goods obtained had been taken away, in value about 18l. I took away the remainder. I believed that her husband was living with her when I served her.

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The prosecution put in and proved a deed of separation dated the 20th of December, 1865, made between the said Eliza Davis and the said Alfred Allen Davis, and a certain trustee therein named, by and on behalf of the said Eliza Davis, and executed by the said parties thereto, which provides (*inter alia*), that in the event of the husband being bound to pay any debt incurred by her, he should be empowered to deduct same from the annual allowance made to her under its provisions.

Further proof was given that since the execution of such deed the said Eliza Davis had lived separate and apart from her said husband, Alfred Allen Davis, and had received by monthly payments the annuity of 100l. per annum, covenanted to be paid by the said Alfred Allen Davis under the said deed of separation.

Evidence was also adduced that on the 1st of August, 1868, the said Eliza Davis (accompanied by a certain man) had entered into an agreement to hold and occupy for the term of three years, No. 4, Caroline-cottages, St. Ann's-road, Brixton-road, the house to which the goods obtained were taken, and that she had left the said house speedily after the receipt of the said goods, carrying with her a portion of the said goods, and that she the said Eliza Davis pawned the major part of such goods so carried away.

Proof was likewise given that the said Eliza Davis had lived with the man before mentioned as his wife in one lodging from the 18th of July to the 6th of August, 1868, and in another lodging from the 6th of August to about the 31st of August, 1868.

It was contended for the prisoner that there was a substantial variance between the false pretences charged in the indictment and the false pretences sworn to in the evidence; also, that the false pretences sworn to were not within the meaning of the act, and that the evidence showed that the goods were not obtained by means of the representations and pretences alleged.

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The Court, after argument, refused to stop the case, holding there was evidence in support of the false pretences alleged to go to the jury, who convicted the said Eliza Davis as above stated.

The Court thereupon reserved the question following for the consideration of the Justices of either Bench and of the Barons of the Exchequer.

Whether there was any evidence in law as to the false pretences alleged in the indictment, and as to the obtaining goods by false pretences to justify the Court in leaving the case to the decision of the jury.

The Court respited judgment and consented to admit the defendant to bail, which, however, she has not given, and she has consequently been committed to prison, there to remain until such question should be considered and determined, unless she previously give bail.

E. RICHARD ADAMS, Chairman.

No counsel appeared on either side.

By the COURT: There was abundant evidence at the trial to sustain the conviction.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 14, 1868.

(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and LUSH, JJ.)

REG. v. WILLIAM DIPROSE. (a)

*Embezzlement—Friendly society—Secretary.*

*A secretary of a friendly society, established under 18 & 19 Vict. c. 63, in which no trustee had ever been appointed, was convicted on an indictment for embezzlement, prior to the coming into operation of the 31 & 32 Vict. c. 116; and the indictment described him as the servant of the treasurer, and also as the servant of O. (a member) and others:*

*Held, that the conviction was wrong.*

CASE reserved at the General Quarter Sessions of the peace holden for the county of Kent on the 3rd of July, 1868.

William Diprose was indicted and tried for embezzlement.

In the first count of the indictment he was alleged to be clerk and servant to Thomas John Coman.

In the second to be clerk and servant to James Crowson and others.

The evidence showed that the prisoner was a member of the Ightham Hope Lodge of Odd Fellows, a friendly society founded in 1860, whose rules had been duly certified by the Registrar of Friendly Societies as being in conformity with law pursuant to the stat. 18 & 19 Vict. c. 63.

The first rule stated that the society had for its object the raising of funds by entrance fees, subscriptions, fines, and interest on capital for the purposes of insuring sums of money to defray the expenses of burial of deceased members and of their wives, for rendering assistance to members sick and unable to work, for supplying medicine and medical attendance to members, and for giving assistance to the widows and orphans of deceased members.

The third rule prescribed that all moneys received on account

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of entrance fees, subscriptions, donations, interest, or capital and fines were to be applied in carrying out the above stated purposes, and paying the expenses of management.

The fourth rule stated that the business was to be conducted by a committee of management consisting of five officers, of whom the secretary was not one.

The fifth rule directed the members to elect three trustees and a treasurer.

The twelfth rule was in the following words: "That the permanent secretary shall attend all meetings of the lodge, take minutes of the proceedings thereof, and keep a correct account of the expenditure of the lodge, prepare all summonses in due time, attend the auditors to point out and explain anything they may require respecting the accounts, balance such accounts when required by the officers or a majority of the lodge. He shall prepare all documents for the district and board of directors, and make the annual and other returns to the registrar as required by the Friendly Societies Act (18 & 19 Vict. c. 63), and for his services he shall receive such sum per annum as may be agreed upon, payable out of the management fund. He shall pay over to the treasurer, within five days after each lodge night, all money he may have received, or be fined one shilling."

The society consisted of many members.

No trustees had ever been appointed.

Mr. Thomas John Coman was treasurer of the society at the time of the trial, and had been ever since 1861.

The prisoner, William Diprose, was appointed permanent secretary in 1862, and remained in that office till some time in January, 1868, and had a salary from the society of 3*l.* a year. The prisoner performed the duties of secretary laid down in rule 12.

In December, 1867, the prisoner received certain subscriptions and other sums of money from various members for the use of the society, for which he did not account, but fraudulently appropriated them to his own use.

It was contended by counsel on behalf of the prisoner, that the prisoner being a member of the society, and there being no trustees, he was a partner in the society, and as such entitled to a share in its funds, and could not be convicted of embezzling money in which he had such an interest. Secondly, that he could not properly be convicted on the indictment, on the ground that there was no evidence that he was clerk or servant to Thomas John Coman, the treasurer, or to the other members of the society collectively, of whom James Crowson, the person named in the second count, was one.

The stat. 18 & 19 Vict. c. 63, and the cases *Reg. v. Taffs* (4 Cox Crim. Cas. 169), *Reg. v. Proud* (L. & C. 97; 9 Cox Crim. Cas. 22), and the cases collated in 2 Russ. on Crimes, 432, were referred to.

The jury convicted the prisoner; but, as the Court entertained some doubt, judgment was deferred, and the prisoner let out on bail.



The opinion of the Court for Crown Cases Reserved is requested, whether the objections taken on behalf of the prisoner ought to have prevailed so far as to have prevented a conviction on either count?

JOHN G. TALBOT,

Chairman of the Court of Quarter Sessions.

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*Hayman*, for the prisoner.—The conviction cannot be sustained. This conviction took place before the 31 & 32 Vict. c. 116, and must be determined by the law as it stood previously thereto. The prisoner was not the servant of Coman, the treasurer, as alleged in the first count, or of Crowson and others, the members of the society, as alleged in the second count. The society was formed under the 18 & 19 Vict. c. 63 ("An Act to consolidate and amend the Law relating to Friendly Societies"). By sect. 18 of that statute all the property in such societies is vested in the trustee or trustees for the time being. Here no trustees have ever been appointed. It is true that sect. 17 provides that where no trustee shall have been appointed in societies established under any of the repealed acts, the treasurer or other person who has custody of moneys of such society shall be taken to be a trustee within the meaning of this Act. That provision, however, has no application to this society, as it was not established under any of the repealed statutes, but under the 18 & 19 Vict. c. 63. There is no provision that vests the property in the treasurer or any person other than the trustees; and, that being so, the property remains in the members conjointly, and the prisoner could not be convicted of embezzling it. In *Reg. v. Loose* (29 L. J. M. C. 133; 8 Cox Crim. Cas. 302) it was held that a trustee of a friendly society, under the 18 & 19 Vict. c. 63, could not be convicted of larceny or as a fraudulent bailee for having misappropriated money which, by a resolution of the society, he was directed to take to a bank. The money was laid in the indictment as the property of the treasurer, but the Court held that the money was not the money of the treasurer after he had parted with it. As to the second count, in which the money is laid as the property of Crowson and others, that is bad on the authority of *Reg. v. James Taffs* (4 Cox Crim. Cas. 169). The only difference between Taffs' case and the present is, that in Taffs' case the society was unenrolled; but for the purpose of this objection that makes no difference. There Maule, J., said: "He (the prisoner) is alleged to be the servant to James Dean and others, but he is no otherwise servant to James Dean and others than as interested with them in the fund, and as doing something for the benefit of the whole society. Dean and others are in no special position as masters to him; he is rather in the nature of a partner having an advantage over the other partners by reason of an allowance to him for doing more of the work than the others do. The money is not the money of James Dean and others except in so far as it is the money of the prisoner and James Dean, and other persons. Before the 7 Geo. 4, c. 64, s. 14, enabled the persons framing an

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indictment to describe partners as 'others,' the names of all the members of this society must have been set out. If the name of the prisoner or of any other member had been omitted in the enumeration of the members there would have been a failure in the proof. If the name of the prisoner had been inserted, the indictment would have been bad on its face, for it would have charged the prisoner with embezzling his own money." Some obscurity was introduced in the Court below by the citation of *Reg. v. Proud*; but in a subsequent case *Martin, B.*, said that the property there was laid in the trustees.

*Barrow*, for the prosecution.—The conviction was right. In *Jenson's case* (1 Moo. C. C. 434), it was held that the clerk of a savings bank was properly described as clerk to the trustees, although elected by the managers. So here the prisoner may be described as the clerk of the treasurer if he was appointed in that capacity by the members of the society; and rule 12 seems to make him in a sense the servant of the treasurer. In *Reg. v. Burgess* (32 L. J. M. C. 185) it was held that one of the committee of a co-operative society who stole money from the till which had been placed there by a servant employed to sell the goods, and who was accountable for the money, might be convicted on an indictment which charged him with stealing the moneys of B.

BOVILL, C.J.—We are of opinion that this objection ought to prevail. Such an objection is now removed by the act of 31 & 32 Vict. c. 116. It cannot be said that the secretary of such a society is a servant of the treasurer, as alleged in the first count. Then, upon the second count, the moment you make the allegation that he was the servant of Crowson and others the indictment is bad, for it is, as Maule, J., said in *Reg. v. Taffs*, the same as if you had set out the names of all the members, and among them would have been the prisoner's own, and that would have been to have described him as the servant of himself. The case is within *Reg. v. Taffs*, and the conviction must be quashed.

The other Judges concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

November 14, 1868.

(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and  
LUSH, JJ.)

REG. v. JAMES SHICKLE. (a)

*Larceny—Young partridges.*

*Partridges were reared from eggs by a common hen; they could fly a little, but still remained with the hen as her brood, and slept under her wings at night, and from their inability to escape were practically in the power and dominion of the prosecutor:  
Held, that they were the subject of larceny.*

CASE reserved for the opinion of this Court by Cockburn, C.J.:  
James Shickle was tried before me at the last Assizes for the county of Suffolk, on an indictment for larceny, for stealing eleven tame partridges.

There was no doubt that the prisoner had taken the birds *animo furandi*; but a question arose whether the birds in question could be the subject of larceny, and the prisoner having been convicted, I reserved the point for the consideration of the Court.

The birds in question had been reared from eggs which had been taken from the nest of a hen partridge, and which had been placed under a common hen. They were about three weeks old, and could fly a little. The hen had at first been kept under a coop in the prosecutor's orchard, the young birds running in and out, as the brood of a hen so confined are wont to do. The coop had, however, been removed, and the hen set at liberty, but the young birds still remained about the place with the hen as her brood, and slept under her wings at night.

It is well known that birds of a wild nature, reared under a common hen, when in the course of nature they no longer require the protection and assistance of the hen, and leave her, betake themselves to the woods or fields, and after a short time differ in

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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no respect from birds reared under a wild hen of their own species. The birds in question were neither tame by nature nor reclaimed. If they could be said to be tame at all, it was only that their instinct led them during their age of helplessness to remain with the hen. On their attachment to the hen ceasing, the wild instincts of their nature would return, and would lead them to escape from the dominion and neighbourhood of man. On the other hand, from their instinctive attachment to the hen that had reared them, and from their inability to escape, they were practically in the power and dominion of the prosecutor. The question is whether, under the circumstances, there can be such property in birds of this description as can be the subject-matter of larceny.

The prisoner is at large on bail.

If the Court should be of opinion that the conviction should be affirmed, he is to come up for judgment at the next Assizes, and is to be sentenced to six weeks' imprisonment with hard labour.

A. E. COCKBURN.

*Douglas*, for the prisoner.—Partridges are birds *feræ naturæ*, and not the subject of larceny. There was nothing to prevent these young birds escaping. They were not tame nor reclaimed, and they could fly a little. They could not, therefore, be the subject of larceny.

No counsel appeared for the prosecution.

BOVILL, C.J.—The question is whether these young partridges, under the circumstances, were the subject of larceny. It is found in the case that from their instinctive attachment to the hen that reared them, and, from their inability to escape, they were practically in the power and dominion of the prosecutor. This case is similar to *Reg. v. Cory* (10 Cox Crim. Cas. 23), where Channell, B., held "that young pheasants hatched by a hen and under the care of the hen in a coop in a field at a distance from a dwelling-house were the subjects of larceny," and directed the jury that "As a matter of law he had no difficulty in telling them that the pheasants in question having been hatched by hens and reared in a coop were tame pheasants at the time they were taken, whatever might have been their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls or any other poultry, the character of the birds in no way affecting the law of the case, but only the question of identity." The question in this case was whether at the time the young partridges were stolen the prosecutor had such a property in them that they could be the subject of larceny. At the time when hatched they were tame birds, and had never ceased to be so at the time they were taken by the prisoner, and were, therefore, the subject of property.

CHANNELL, B., concurred.

BYLES, J.—The only distinction between this case and that of wild birds or animals reclaimed and brought under the dominion of man is here that they were born tame and had not become wild.

BLACKBURN and LUSH, JJ. concurred.

*Conviction affirmed.*

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*Larceny—  
Partridges in a  
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## COURT OF CRIMINAL APPEAL.

November 16, 1868.

(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and  
LUSH, JJ.)

REG. v. RALPH BARROW.(a)

*Rape—Consent—Fraud.*

*The prosecutrix, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened she found the man was not her husband, and awoke her husband:*

*Held, that a conviction for a rape upon this evidence could not be sustained.*

CASE reserved for the opinion of the Court by Fitzroy Kelly, C.B., at the Liverpool Summer Assizes, 1868.

This was an indictment for rape.

An alibi was set up, and a great deal of evidence given for and against it; but the jury, to my entire satisfaction, found the prisoner guilty.

The question is, whether the offence, as proved, amounted in point of law to rape.

This question depended entirely upon the evidence of the prosecutrix, Harriet Geldart, which was as follows:—

I and my husband lodge together at William Garner's. We sleep upstairs on the first floor, and were in bed together on the night of Saturday, the 21st of June. I went to bed about twelve o'clock, and about two o'clock on Sunday morning I was lying in

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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bed, and my husband beside me. I had my baby in my arms, and was between waking and sleeping. I was completely awakened by a man having connection with me, and pushing the baby aside out of my arms. He was having connection with me at the moment when I completely awoke. I thought it was my husband, and it was while I could count five after I completely awoke, before I found it was not my husband. A part of my dress was over my face, and I got it off and he was moving away. As soon as I found it was not my husband, I pulled my husband's hair to awake him. The prisoner jumped off the bed.

On cross-examination she added: Till I got my dress off my face I thought it was my husband. After he had finished I pulled the dress off my face. I was completely awakened by the man having connection with me and the baby being moved.

On re-examination she said: The baby was pushed on further into the bed.

The jury found this evidence, as I have stated it, to be true.

Upon these facts the prisoner's counsel, Mr. Cottingham, submitted that the indictment was not sustained, and quoted 1 Russ. on Crimes, edit. of 1843, 677; *R. v. Jackson* (Russ. & Ry. 487); *Reg. v. Saunders* (8 C. & P. 265); *R. v. Williams* (8 C. & P. 286); *Reg. v. Camplin* (1 Den. C. C. 89). *Reg. v. Fletcher* (2 Dears. 63; and 8 Cox Crim. Cas. 131) was also referred to.

I thought, especially on the authority of the judgment delivered by Lord Campbell in *Reg. v. Fletcher*, that the case was made out, inasmuch as it was sufficient that the act was done by force, and without consent before or afterwards; that the act itself, coupled with the pushing aside the child, amounted to force, and there was certainly no consent before, and the reverse immediately afterwards; but I reserved the point for the Court of Criminal Appeal.

FITZROY KELLY.

No counsel appeared on either side.

BOVILL, C.J.—We have considered this case. It does not appear that the prosecutrix was asleep or unconscious at the time when the first act of connection took place. What was done was, therefore, with her consent, though that was obtained by a fraud. We are of opinion that this case comes within that class of cases in which it has been decided that where, under such circumstances, consent has been obtained by fraud, the offence does not amount to rape.

The rest of the Court concurred.

*Conviction quashed.*



## COURT OF CRIMINAL APPEAL.

November 14, 1868.

(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and  
LUSH, JJ.)

REG. v. CHARLES PRINCE. (a)

*Larceny—Agent parting with property.*

*A cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine :*

*Where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly, it does not amount to the crime of larceny.*

CASE reserved for the opinion of this Court by the Common Serjeant of the City of London.

Charles Prince was tried before me at the August Session of the Central Criminal Court, on an indictment charging him, in the first count, with stealing money to the amount of 100*l.*, the property of Henry Allen ; in the second count with receiving the same knowing it to have been stolen ; and in two other counts the ownership of the money was laid in the London and Westminster Bank.

It appeared in evidence that the prosecutor, Henry Allen, had paid moneys amounting to 900*l.* into the London and Westminster Bank on a deposit account in his name, and on the 27th of April, 1868, that sum was standing to his credit at the bank. On that day the wife of Henry Allen presented at the bank a forged order purporting to be the order of the said Henry Allen for payment of the deposit, and the cashier at the bank believing the authority to be genuine, paid to her the deposit and interest in eight bank notes of 100*l.* each and other notes.

Among the notes of 100*l.* was one No. 72,799, dated the 19th of November, 1867.

On the 1st of July, 1868, the wife of Henry Allen left him and his house ; and she and the prisoner were shortly afterwards found on board a steamboat at Queenstown, on its way from Liverpool to New York, passing as Mr. and Mrs. Prince, Mrs. Allen then

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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having in her possession nearly all the remainder of the notes obtained from the bank.

The note for 100l., No. 72,799, was proved to have been paid away by the prisoner in payment for some sheep in May, 1868, and he said he had it from Mrs. Allen.

Upon this evidence it was objected by prisoner's counsel that the counts alleging the property in Henry Allen must fail, as the note had never been in his possession; and that, as to the other counts, the evidence did not show any larceny of the note from the bank by the wife, but rather an obtaining by forgery or false pretences by her, and that the receipt by the prisoner from her was not a receipt of stolen property.

I held, however, that the forged order presented by the wife was, under the circumstances, a mere mode of committing a larceny against the London and Westminster Bank, and that the prisoner was liable to be convicted on the fourth count.

The jury found the prisoner guilty on that count, and I respited judgment, and reserved for the consideration of the Court the question whether the obtaining the note from the bank by Mrs. Allen, under the circumstances stated, was a larceny by her. If not, the conviction must be reversed.

The prisoner remains in custody awaiting judgment.

THOMAS CHAMBERS.

*A. J. H. Collins*, for the prisoner.—The prisoner was convicted on the fourth count of receiving the money, knowing it to have been stolen from the London and Westminster Bank, and therefore, if there was no larceny committed on the bank, the conviction must be quashed. A bank cashier has power to part with the possession and property of the bank money in payment of cheques which he believes genuine. In *Story on Agency*, par. 114, it is said: "It may be stated as a general proposition, that the officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions, and that their acts, within the scope of such usage, practice, and course of business bind the bank in favour of third persons having no knowledge to the contrary. The cashier of a bank is usually intrusted with all the funds of the bank in cash, notes, bills, and other *choses in action*, to be used from time to time for the ordinary and extraordinary exigencies of the bank." And in par. 115: "If the cashier of a bank should pay to a *bonâ-fide* holder a forged cheque drawn upon the bank, the payment could not be recalled, it would be obligatory; for it is within the duty of the cashier to answer drafts drawn on the bank, and the bank intrusts him with an implied authority to decide upon the genuineness of the handwriting of the drawer of the cheque when presented for payment:" (*Bank of United States v. Bank of Georgia*, 10 Wheat. R. 332.) So also in *Chambers v. Miller* (32 L. J. C. P. 30) it was held that the transfer of money by a cashier of a bank in payment of a cheque drawn by a person

who has no assets at the bank is complete, and the cashier has no right to take the money back from the payee by force, and the bank could not have recovered it from the payee in an action. [BLACKBURN, J.—There the cheque was a genuine one, but the drawer's account was overdrawn. That case is clear enough.] In *Reg. v. Jackson* (1 Moo. C. C. 119), where a pawnbroker's servant, who had a general authority from his master to act in his business, delivered up a pledge to the pawnor upon receiving a parcel which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was holden to be no larceny, because the servant who had a general authority from the master parted with the property and ownership, not merely with the possession. So in *Reg. v. Adams* (1 Den. 38, C. C.), where the prisoner went to a shop with a forged order, and obtained from the shopkeeper a quantity of bacon and hams, the shopkeeper believing the order to be a genuine one, this was holden not to be a larceny. In 1 Hale P. C. 506, it is said: "If A. comes to B. and by a false message or token receives money of him, and carries it away, it is no felony, but a cheat, punishable by indictment at common law, or upon the statute of 33 Hen. 8, c. 1, by sitting in the pillory." See also Roscoe C. L. 612. The same point was determined in *Rex v. Parks* (2 East P. C. 671), *Rex v. Atkinson* (2 East P. C. 673), and *Rex v. Essex* (27 L. J. M. C. 20). The distinction is between servants or agents having a general or limited authority only to deal with their master's property. In *Reg. v. Barnes* (2 Den. C. C. 59) a servant had authority in the absence of the chief clerk to buy kitchen stuff for his masters, and to make payment to the seller; the chief clerk was authorised to repay A. for such purchases on production by A. of a ticket containing a statement of such a purchase having been made. A. produced to the chief clerk a ticket containing a statement of a purchase which had not in fact been made, and thereupon the chief clerk paid him 2s. 3d., this was held not to be larceny, but false pretences. So where a clerk in a savings bank obtained a cheque from the manager upon a false representation that a depositor had given notice of withdrawal, and for the purpose of handing it over to the depositor, and it was found to be the course of business that if a depositor could not attend at the proper time to receive the cheque it was handed to the prisoner as the agent of the depositor, this was held to be false pretences, and not larceny. Upon these authorities it is submitted that the cashier having parted with the property in, as well as the possession of, the 100*l.* note this conviction must be quashed.

*Poland*, for the prosecution.—This is a case of larceny, for the cashier of the bank had no power to part with the property in the money. No doubt the authorities are conflicting; but in most of the cases cited for the prisoner there was an intention on the part of the owner at the time to part with the property alleged to be stolen, as in *Reg. v. Adams* and *Rex v. Atkinson*. As to *Reg. v.*

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*Jackson*, which is somewhat like the present, the Judges said that the servants had a general authority, and did part with the property and ownership. [BOVILL, C.J.—The cashier of a bank is the only person who deals with the money in the till for the purpose of paying it away over the counter, and he is the person who is to judge of the genuineness of the signature to a cheque.] But the money does not pass to the payee when obtained by a deceit practised on the clerk. In *Reg. v. Longstreeth* (1 Moo. C. C. 137), it was held that obtaining a parcel from a carrier's servant by falsely pretending to be the person to whom it was directed, if obtained *animo furandi*, is a larceny. BLACKBURN, J.—There the servant had no authority to part with the ownership to any but the right person.] The carrier's servant would have the same authority as the cashier to decide as to the identity of the person owning the parcel. The bank clerk can scarcely have power to give away money on what turns out to be a fictitious cheque. In *Rex v. Wilkins* (1 Leach C. C. 520), where the prisoner, *animo furandi*, obtained by a false pretence hats from the prosecutor's servant, who was sent to deliver them at a particular place, that was holden to be larceny. [BLACKBURN, J.—There the servant had no authority to part with the property at all.] In *Rex v. Small* (8 C. & P. 46), where a servant was sent with goods and change for a crown piece to be delivered at a particular house, and, on the way, the prisoner met the servant and fraudulently induced him to part with the goods and change for a bad crown piece, this was held to be larceny. In the note to that case is the following passage: "2 Fost. P. C. 673; 1 Leach, 520; Roscoe, p. 493. In that case Gould, J., in stating the reasons of the judgment, laid down the following rules as clearly settled; that the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be divested by a tortious taking from the servant; that this rule held in all cases where servants had not the absolute dominion over the property, but were only intrusted with the care or custody of it for a particular purpose." In *Reg. v. Stewart* (1 Cox Crim. Cas. 174), where goods were ordered by the prisoner to be sent to a particular place; and they were so sent by a servant who had orders not to part with them without the price, and the prisoner induced the servant to take a valueless cheque as payment, and so obtained the goods, this was holden to be larceny. On these grounds it is submitted that the conviction was good.

BOVILL, C.J.—I am of opinion that this conviction cannot be supported. The distinction between larceny and false pretences is very material. The one is a felony, and the other a misdemeanor; and although, by reason of modern legislation, it has become not of so much importance as formerly, it is still desirable to keep up the distinction. To constitute a larceny there must be a taking of the property against the will of the owner, which is the essence of the crime of larceny. The authorities cited by the

counsel for the prisoner show that where the property has been obtained voluntarily from the owner, or a servant acting within the scope of his authority, the offence does not amount to larceny. The cases cited for the prosecution were cases where the servant who parted with the property had a limited authority only. In the present case the cashier of the bank was acting within his authority in parting with the possession and property in the money. And if, as in this case, that was done with the intention of divesting his employers of the property, the conviction cannot be sustained. Under these circumstances the conviction must be quashed.

CHANNELL, B.—I am of the same opinion. The cases cited for the prisoner are distinguishable from those cited for the prosecution. In the one set of cases the servant was acting under a general authority; in the other, under a special and limited authority. If the transaction is one where the servant had a general authority, and he has done all that he intended to do in order to pass the property, the property passes from the master. Therefore, here the money passed to Mrs. Allen, and cannot be said to have been stolen. The conviction is bad.

BYLES, J.—I am of the same opinion. My judgment is founded on the weight and balance of authority.

BLACKBURN, J.—I am of the same opinion. In the old times larceny was a capital felony, and the taking of the property stolen must have been proved to have been against the will of the owner. The courts held that where the owner intended to part with the property in the thing alleged to have been stolen, that was not larceny; and also that where the servant or agent had a general authority to part with his employer's property in the management of the business, there the offence was not larceny if he intended to part with the property wrongfully obtained. The case was different if the servant or agent had not authority to part with the property. The difficulty is to decide whether a given case falls within the one class or the other. Where a servant has no general authority to deal with his master's property, but he is told to deliver a parcel to A. B., and no one else, then he is acting under a limited authority; and it was held by the Judges that a person obtaining the parcel from the servant by fraud was guilty of larceny: (*Reg. v. Longstreeth*). The same Judges had a short time previously decided the case of *Rex v. Jackson*. A cashier of a bank has a general authority to part with his employer's money if a person presents a cheque to him, if he believes the cheque to be a genuine one; and if he does so, and it turns out to be a forged cheque, the offence is not larceny.

LUSH, J.—I am of the same opinion. The cashier of a bank is placed at the counter for the purpose of parting with the money of his masters in payment of cheques as he thinks fit. In this case the money was parted with by the cashier to Mrs. Allen for a cheque which he believed to be genuine. It is not a case of larceny therefore.

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*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

November 16, 1868.

(Before BOVILL, C.J., CHANNELL, B., BYLES, BLACKBURN, and LUSH, JJ.)

REG. v. JAMES ANDERSON.(a)

*Manslaughter—Foreigner—British ship—Jurisdiction.*

*A foreigner, one of the crew of a British ship, committed manslaughter on board a British ship while it was in a tidal river in the empire of France. The ship was in a part of the river where the tide ebbs and flows, and where great ships go :*

*Held, that the Central Criminal Court had jurisdiction to try the offender.*

CASE reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this Court.(b)

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The following is an abstract of the indictment and the material parts of the evidence :—

James Anderson was indicted for that he, being a seaman on board the *Hatfield Brothers*, a British ship afloat out of Her Majesty's dominions, namely, on the river Garonne, at Panillac, in France, did, on the 18th of September, murder John Williams on board the said ship. Second count alleged that he was a British subject. Third count : That the murder was committed at Bordeaux, in France, and that the prisoner was a seaman on board the *Hatfield Brothers*. Fourth count same as the third, only alleged that he was a British subject. Fifth count : That the murder was committed on the high seas, and that the prisoner was a British subject. Sixth count : That it was committed on board a British ship in a foreign port, namely, Bordeaux. Seventh count same as fifth, but omitting the last allegation. Eighth count : That the prisoner was a subject of Her Majesty on land out of the United Kingdom, namely, at Bordeaux. Ninth count : Murder in the ordinary form.

The first witness (Jeffery Powers) examined said : I was one of the crew of the *Hatfield Brothers*. I joined her on her last voyage ; she sailed from Philadelphia ; she belonged to Yarmouth, Nova Scotia ; she carried the English flag. William Hatfield was the master, the same person that I saw before the English consul at Bordeaux. On the 17th of September the vessel was in the Garonne. On the 18th she anchored about half-way up the river towards Bordeaux near side ; she was afloat about 300 yds. from the shore on the nearest side ; the river is about half a mile wide at that point ; the tide flows there.

William Champion Parsons : I am a clerk in the Custom House, London. I produce a duplicate of the registration of the *Hatfield Brothers* ; it is a certified copy. It is registered as a British ship, " Port of Registry, Yarmouth, N.S.," that is, " Nova Scotia," British built, 200 tons. Frederick Hatfield, captain and part owner, No. 51,997.



James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

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At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about 300 yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavourable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter.

J. BARNARD BYLES.

*Montagu Williams*, for the prisoner.—It is submitted that the Central Criminal Court had no jurisdiction under the 4 & 5 Will. 4, c. 36, s. 22(a) to try the prisoner, he being a foreigner(b) and the offence having been committed in foreign parts. “The Merchant Shipping Act, 1854” (17 & 18 Vict. c. 104, s. 267), enacts that “All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty’s dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same

(a) “And whereas it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the Admiralty of England should speedily be brought to trial: Be it therefore enacted, by and with the authority aforesaid, that it shall and may be lawful for the Justices and Judges of oyer and terminer and gaol delivery to be named in and appointed by the commissions to be issued under the authority of this act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed, on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done and committed upon the high seas aforesaid within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had and taken by and before the said Justices and Judges of oyer and terminer and gaol delivery, shall be valid and effectual to all intents and purposes, whatsoever; and that it shall and may be lawful for any three of the said Justices and Judges of oyer and terminer and gaol delivery to order and direct the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before-recited act (7 Geo. 4).

(b) The Court said in the course of the argument that it must be taken that it was satisfactorily proved at the trial that the prisoner was a foreigner and an alien.

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punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England." That enactment applies only to British subjects employed in British ships, and not to foreigners. The marginal note to the section is, "Offences committed by British seamen at foreign ports to be within the Admiralty jurisdiction." Sir G. C. Lewis on Foreign Jurisdiction, p. 24, comments on the above section, and says, "It seems that under this provision a theft or even a common assault committed by a British seaman upon a native in a foreign port might be the subject of an indictment in England;" but, he adds, "it is possible, however, that the very extensive terms of this enactment might receive some limitation from judicial interpretation." No doubt the Merchant Shipping Amendment Act (18 & 19 Vict. c. 91, s. 22) will be relied on, which enacts that "If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour; or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits," &c. It is submitted that this section does not apply, for the vessel was not on the high seas at the time the offence was committed. [BLACKBURN, J.—A ship bearing a national flag is part of the territory of the nation whose flag she carries, and her crew are as much subject to its laws as if they had actually been in her territory. LUSH, J.—Had this section any further object than to prescribe the offence and mode of trial? If not, then it would apply only to British subjects and known offences, and not extend the ambit of the former provisions. I cannot think it would extend to the case of a foreigner who had committed an offence within three months after leaving the ship, and had then returned to this country. BOVILL, C.J.—Have you referred to Ortolan's "Règles Internationales et Diplomatie de la Mer?" His Lordship then quoted from it at pp. 269, 271 (ed. 4) (a).] In *Depardo's*

(a) The following is the passage quoted by his Lordship:—

M. Ortolan says, "M. Wheaton dans son "Traité de Droit International" d'accord en cela avec d'autres écrivains, formule le principe général que 'Les bâtiments marchands d'un état quelconque entrés dans les ports d'un autre état, ne sont pas exempts de la juridiction locale, à moins d'une convention expresse; et qu'ils le sont seulement en ce qui a été prévu par une telle convention.' Suivant la doctrine Française cette proposition est très absolue et susceptible de quelques restrictions.

case (1 Taunt. 26), the prisoner, a Spaniard, was taken prisoner at sea by a British vessel, and, whilst abroad, entered on board an Indiaman as one of the crew, sailed to China, and murdered an Englishman in the Canton river, the ship at the time being in the tideway about eighty miles from the sea. It was argued for the prisoner, on a case reserved for the opinion of the twelve Judges, that he was not liable to be tried in this country because he never became subject to the laws of it, and that he did not become so by entering on board the Indiaman. No judgment was given in the case, but the prisoner was discharged. In *Rex v. De Mattos* (7 C. & P. 458), the prisoner, a Spaniard, having been employed on a British ship, left it, and became located at Zanzibar, an island in the Indian seas, under the dominion of an Arab king. While on shore, he engaged in an encounter with one of the crew, and inflicted on him blows, from the effects of which the seaman afterwards died on board the ship; and it was held that there was no jurisdiction to try the prisoner in this country. [BLACKBURN, J.—But Vaughan, J., there said, that though the prisoner was on board ship for a time, it seemed that the articles were abandoned and he was living on shore and had been so for months at the time of the commission of the offence.] In *Reg. v. Lewis* (1 Dears. & B. C. C. 122), it was held that a foreigner who kills another foreigner abroad, on land out of the Queen's dominions, or on the high seas on board a foreign ship, is not triable in England. [BLACKBURN, J., referred to *Reg. v. Lopez* (1 Dears. & B. C. C. 525), which shows that if the ship had been a British one, he would have been triable here.] The learned counsel then referred to the cases of *The United States v. Holmes* (5 Wheat. Rep. 412), *Rex v. Allen* (1 Moo. C. C. 494), and *Rex v. Jemot* (Old Bailey, 1812, MS.).

*Poland* (Beasley with him), for the prosecution.—The conviction was right. It is not necessary to contend that the section of the Merchant Shipping Act applies in its terms to this case. It may be read as dealing with British subjects only, but then all persons are in one sense such if they are subject to the British laws. Lord Hale (1 Hale P. C. 542) says: "Though the stat. 21 Hen. 8, c. 11, speaks of the king's subjects, it extends to aliens robbed; for though they are not the king's natural-born subjects they are the king's subjects when in England by local allegiance." In

Voici comment en France, à défaut de convention spéciale, est entendue et pratiquée la règle de droit international sur cette matière. Notre législation établit quant aux faits que se passent à bord des navires de commerce dans un port ou dans une rade en pays étranger une distinction entre, 1°, d'une part les actes de pure discipline intérieure du navire; ou même les crimes ou délits communs commis par un homme de l'équipage contre un autre homme du même équipage lorsque la tranquillité du port n'en est pas compromise; et 2°, d'autre part les crimes ou délits commis même à bord contre des personnes étrangères à l'équipage ou par tout autre que par un homme de l'équipage; ou même ceux commis par les gens de l'équipage entre eux si la tranquillité du port en est compromise. A l'égard des faits de la première classe notre législation déclare que les droits de la puissance à laquelle appartient le navire doivent être respectés; que l'autorité locale par conséquent ne doit pas s'ingérer dans ces faits à moins que son secours ne soit réclamé; ces faits restent donc sous la police et sous la juridiction de l'état auquel appartient le navire."

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*Depardo's* case the contention was that the prisoner was an alien enemy; and in *Reg. v. Lewis*, the offence was committed by one foreigner upon another in a foreign vessel upon the high seas. In *Rex v. De Mattos*, the prisoner was tried under a special commission issued under the 9 Geo. 4, c. 31, s. 7, and acquitted because (1) he was not a British subject within the meaning of the statute, and (2) because the death was on shipboard, and though the blows were inflicted on shore the offence was committed on shipboard and not "on land out of the United Kingdom." The sea is, as it were, common territory, and a ship is a sort of floating island, and persons on board a British ship do not cease to be British subjects when it is in foreign parts. In Wheaton's *International Law*, 202 (ed. 1863), it is said, "The law of France in respect to offences and torts committed on board foreign merchant vessels in French ports establishes a twofold distinction between—(1) Acts of mere interior discipline of the vessel, or even crimes and offences committed by a person forming part of its officers and crew against another person belonging to the same, where the peace of the port is not thereby disturbed. (2) Crimes and offences committed on board the vessel against persons not forming part of its officers and crew or by any other than a person belonging to the same; or those committed by the officers and crews upon each other if the peace of the port is thereby disturbed. In respect to acts of the first class the French tribunals decline taking jurisdiction. The French law declares that the rights of the power to which the vessel belongs should be respected, and that the local authority should not interfere unless its aid is demanded. These acts therefore remain under the police and jurisdiction of the state to which the vessel belongs. In respect to those of the second class, the local jurisdiction is asserted by those tribunals. It is based on the principle that the protection accorded to foreign merchantmen in the French ports cannot divest the territorial jurisdiction, so far as the interests of the state are affected; that a vessel admitted into a port of the state is of right subjected to the police regulations of the place; and, that its crew are amenable to the tribunals of the country for offences committed on board of it against persons not belonging to the ship, as well as in actions for civil contracts entered into with them; that the territorial jurisdiction for this class of cases is undeniable." In *Rex v. Allen* (1 Moo. C. C. 494), it was held that larceny on board a British ship in a Chinese river is within the jurisdiction of the Central Criminal Court, "the place being one where great ships go." So that foreign rivers where the tide ebbs and flows are within the Admiralty jurisdiction. In the *United States v. Wiltberger* (5 Wheat. 76, Amer. Rep.), it was held that the courts of the United States have no jurisdiction under the act of April 30, A.D. 1790, c. 36, of the crime of manslaughter committed by the master upon one of the seamen on board a merchant vessel of the United States lying in the river Tigris in China, thirty miles above its mouth off Whampoa, about

100 yards from the shore, in four and a half fathoms of water, and below low-water mark ; but the court so decided on the ground that the offence was not committed "upon the land or on the seas," within the true construction of that statute. In the *United States v. Coombs* (12 Peters 71, Amer. Rep.), it was laid down that the Admiralty jurisdiction is limited to the sea, and to the tide water as far as the tide flows. In *Thomas v. Lane* (2 Sumner 1), it was held that "The Admiralty jurisdiction as to torts depends on locality, and is limited to torts committed on the high seas, or at farthest to torts committed on the waters within the ebb and flow of the tide." And the marginal note also says, "It seems that torts committed on tide waters within foreign ports are within the Admiralty jurisdiction." In the *United States v. Hamilton* (1 Mason 152, Amer. Rep.), it was held that larceny on board an American ship in an inclosed dock in a foreign port is not punishable under the statute of the 30th of April, 1790, and Story, J., said, "The place where the ship lay was in no sense the high seas." The Admiralty has never held that the waters of the havens where the tide ebbs and flows are properly the high seas, unless those waters are without low-water mark." And in the *Propeller Genesee Chief v. Fitzhugh* (12 Howard 443, Amer. Rep.), the marginal note is "The Act of Congress of the 26th of February, A.D. 1845 (5th. stat. at large, 726), extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same is consistent with the constitution of the United States. It does not rest upon the power granted to Congress to regulate commerce, but it rests upon the grounds that the lakes and navigable waters connecting them are within the scope of Admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted. The Admiralty and maritime jurisdiction granted to the Federal Governments by the constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers where commerce is carried on between different States or with a foreign nation." The following authorities were also referred to : 1 Kent's Comm., 10th ed., p. 405, *et seq.* (a) ; Parson's Maritime Law, 511 ; stats. 28 Hen. 8, c. 15, s. 1 ; 15 Ric. 2, c. 3 ; and 25 Hen. 8.

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(a) In 1 Kent's Com. 10th ed. p. 405 it is said that "it was maintained that in very early periods the Admiralty jurisdiction in civil cases extended to all maritime causes and contracts, and in criminal cases to all torts and offences, as well in ports and havens within the ebb and flow of the tide as upon the high seas ; and that the English Admiralty was formed upon the same common model, and was coextensive in point of jurisdiction with the maritime courts of the other commercial powers of Europe. It was shown by an exposition of the ancient cases that Lord Coke was mistaken in his attempt to confine the ancient jurisdiction of the Admiralty to the high seas, and to exclude it from the narrow tide waters and from ports and havens. The court agreed with the Admiralty civilians that the stats. 13 Ric. 2, 15 Ric. 2, and 2 Hen. 4 did not curtail this ancient and original jurisdiction of the Admiralty, and that, consistently with those statutes, the Admiralty might exercise jurisdiction over torts and injuries upon the high seas and in ports within the ebb and flow of the tide, and in great streams below the first bridges. On the sea-shore or coast high and low water mark determine what was parcel of the sea and what was the line of division between



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BOVILL, C.J.—There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels—one at the port of Antwerp, and the other at Marseilles—and where, on the local authorities interfering, the American Court claimed exclusive

the Admiralty and the courts of law; and it was held that it ought to be so considered, by parity of reasoning, where the tide ebbs and flows in ports and havens; and that the Admiralty jurisdiction extends to all tide waters in havens and rivers below the first bridges."

The following passage from the notes at p. 406 was also quoted: "In *Thomas v. Lane*, in the case of libel for a maritime port, it was admitted that the Admiralty had no jurisdiction over torts, except those that were maritime or committed on the high seas or on waters within the ebb and flow of the tide, and that the courts of common law denied the jurisdiction if the waters are within the body of the country. It was held, however, to be a clear point that the exception applied to tide waters in foreign countries, and that the Admiralty jurisdiction attached to torts on such waters; but the libel must aver that the trespass was on a tide water in a foreign country, and it cannot be taken by intendment. It was expressly held in the cases of *The United States v. Ross* (1 Gallison 624) and *The United States v. Pirates* (5 Wheat. 184) that a vessel in an open roadstead within a marine league of the shore was upon the high sea under sect. 8 of the act of the 30th of April, 1790, c. 9, so as to give jurisdiction to the courts of the United States. The high seas in that act mean any waters on the sea-coast which are without the boundaries of low-water mark. And yet again it was held in the case of *The United States v. Robinson* (4 Mason 307) that an offence committed in a bay entirely landlocked and inclosed by reefs was not committed on the high seas. The cases are so conflicting that it seems impossible to arrive at any definite conclusion on the subject. It seems to be conceded that the Admiralty has an established jurisdiction to award damages for torts or personal wrongs done on the high seas; and that waters within the ebb and flow of the tide, and which lie within the body of a county, are not in England within the Admiralty jurisdiction (4 Instit. 134; 2 Brown Cir. and Adm. Law, 14; *The Nicholas Wilzen*, 3 Hagg. 369), but that in the United States all tide waters, though within the body of a county, are within the Admiralty jurisdiction, and torts committed on such waters are cognisable by the Admiralty."



jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23rd of March, 1825, has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction; and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

CHANNELL, B.—I am also of opinion that the conviction was right. The 267th section of the Merchant Shipping Act (17 & 18 Vict. c. 104) has been referred to. I agree that it is not necessary to pray in aid that statute. When the question arises this Court must exercise the power which has been created by act of Parliament to deal with the case. Nevertheless, this Court is at liberty to ascertain what the international law may be, and construe the words of the statute in harmony with that if they will bear the construction. I give my judgment on the ground that the ship was within the Admiralty jurisdiction at the time the offence was committed, and that is a sufficient ground to support the conviction. That view is supported by the decisions in *Rex v. Allen* and *Thomas v. Lane*, and is also in consonance with the text books. There may be a difficulty in completely reconciling *The United States v. Wiltberger*, but it cannot be said to be in conflict.

BYLES, J.—I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the

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*Foreigner—*  
*British ship.*

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ANDERSON.  
—  
1868.

*Jurisdiction—  
Foreigner—  
British ship.*

Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act.

BLACKBURN, J.—I am of the same opinion. It is not necessary to decide whether the case comes within the Merchant Shipping Act. If the offence could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which are, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case the vessel was within French territory, and subject to the local jurisdiction if the French authorities had chosen to exercise it. Our decisions establish that the Admiralty jurisdiction extends at common law over British ships on the high seas, or in waters where great ships go as far as the tide ebbs and flows. The cases *Rex v. Allen* and *Rex v. Jemot* are most closely in point, and establish that offences committed on board British ships in places where great ships go are within the jurisdiction of the Court of Admiralty, and consequently of the Central Criminal Court. In America it appears, from the case of *The United States v. Wiltberger*, that it was held that the United States had no jurisdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but, as I understand the American cases of *Thomas v. Lane* and *The United States v. Coombes*, a rule more in conformity with the English decisions was laid down; and upon those authorities I take it that the American courts would agree with us. It is clear, therefore, that a person on board a British ship is amenable to the British law just as much as a British person on board an American ship is subject to the American law. My view is, that when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel.

LUSH, J.—I am of the same opinion. I also think that it is not necessary to resort to the 267th section of 17 & 18 Vict. c. 104, to support this conviction; and I offer no opinion upon the construction of that enactment. I give my judgment in this case on the ground that the offence was committed on board a British ship in a tidal river, navigable for seagoing ships, and at a spot where there is the flux and reflux of the tide, and that it was therefore within the jurisdiction of the Admiralty Court.

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*Jurisdiction—  
Foreigner—  
British ship.*

*Conviction affirmed.*

## WESTERN CIRCUIT.

DEVON SUMMER ASSIZES, 1861.

*Exeter, July 27.*

(Before Mr. Justice BYLES.)

REG. v. DEBRUIEL AND ANOTHER.(a)

*Venue—Guernsey—Larceny—Receiving.*

*Indictment for larceny and receiving. The prisoner had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial:*

*Held, that Guernsey not being a part of the United Kingdom, the prisoner could not be convicted of larceny, for having them in possession here, nor of receiving in England the goods so stolen in Guernsey.*

**I**NDICTMENT for larceny. There was a second count for receiving.

*Carter, for the prosecution.*

The prisoner had robbed a house in Guernsey, and taken the stolen property to England, where he was apprehended and committed for trial.

*Carter, in opening, directed his Lordship's attention to the difficulties of the case. Although the original taking was out of the jurisdiction, the statute had expressly permitted the venue to be laid in any county into which the stolen property was conveyed. The stolen property having been brought by the prisoner*

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

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into Devonshire, could he be said to be there triable for larceny as if the crime had been committed there? But if not guilty of larceny, was he guilty of receiving? It might be contended that receiving goods, knowing them to be stolen, being in itself a crime, the prisoner might be guilty of that crime by a receiving here, though the original larceny was committed out of the United Kingdom.

BYLES, J. (having consulted Channell, B.), said that, the case being new, he had taken the opinion of the learned Baron in the other Court, who agreed with him that the prisoner could not be convicted either of larceny or of receiving. The island of Guernsey was not a part of the United Kingdom, and a larceny committed therein would be in the same position here as if it had been committed in France. Now, clearly, a larceny committed in France could not be taken cognisance of in this country. The statute cited as to venue was expressly limited to larceny within the United Kingdom. Nor could the prisoner be convicted of receiving, because that crime consisted in the guilty receipt of stolen goods; that is to say, goods stolen according to the law of England, and that law does not recognise a stealing in a foreign country as a crime which it will punish. He should direct an acquittal.

*Not guilty.*

[NOTE.—This and the following case were noted at the time, but mislaid. They are, however, of sufficient interest to require preservation.]

## WESTERN CIRCUIT.

CORNWALL SUMMER ASSIZES, 1861.

*Bodmin, August 2.*

(Before Baron CHANNELL.)

REG. v. RENDLE AND ANOTHER. (a)

*Practice—Grand jury—Witness—Evidence.*

*A material witness refused to give any evidence whatever to the grand jury :*

*Held, that the grand jury could not read the deposition of such witness as evidence to enable them to find a bill.*

THE foreman of the grand jury requested the advice of the Judge under the following circumstances :

The charge was that of a rape. The prosecutrix, though she had fully stated the case to the magistrates, now positively refused to give to the grand jury any evidence whatever as to the charge. They desired to know if they might use her deposition for the satisfaction of their own minds as evidence upon which they might find a bill.

CHANNELL, B.—At first I thought that you might do so ; but, upon reference to the statute, I find that no provision has been made for such a case as this. A deposition can be received by the grand jury only in case of death, or such illness as to cause inability to travel. If there was any evidence on which the grand jury could see their way to finding a bill, he could deal with the witness for the contempt ; but they had no authority to do so. It was a case quite unprovided for.

The Chairman said that without the evidence of the prosecutrix there was no case whatever against the prisoner.

*No bill.*

(a) Reported by E. W. Cox, Esq., Barrister-at-Law.

## NORTHERN CIRCUIT.

CARLISLE SPRING ASSIZES.

*February 17, 1869.*

(Before LUSH, J.)

REG. v. THOMAS SMITH.(a)

*Manslaughter—Indictment—Act of omission—Private servant—  
Tramway crossing turnpike road.*

*In an indictment for manslaughter it is not necessary that the indictment should specifically charge that it was by an act of omission.*

*The prisoner, as the private servant of B., the owner of a tramway crossing a public road, was entrusted to watch it. While he was absent from his duty an accident happened, and O. was killed.*

*The private act did not require B. to watch the tramway :*

*Held, that there was no duty between B. and the public, and, therefore, that the prisoner was not guilty of negligence.*

**T**HOMAS SMITH was indicted for the manslaughter of Richard Gibson, at Dearham, on the 8th of February, 1869, under the following circumstances :

The prisoner was employed by a Mr. Harrison, an extensive colliery proprietor near Dearham, and who was also the owner of a tramway which crossed the Maryport and Carlisle turnpike road. It was the prisoner's duty to give warning to any persons when any trucks might cross the said road. The tramway was in existence before the road, and in the act by which the road was made there was no clause imposing on Mr. Harrison the duty of placing a watchman where the tramway crossed the road. On the 8th of February, 1869, the deceased was crossing the tramway, having received no warning that any trucks were about to cross the road; as he was crossing, however, he was knocked down by some trucks and was killed. On inquiry it appeared that the prisoner was absent from his post at that time, although he had strict orders never to be absent.

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.



*Campbell Foster*, for the prisoner, contended that, it being an act of omission, such omission ought to have been stated in the indictment.

The learned JUDGE held that under the words "did feloniously kill and slay" it was unnecessary to state in the indictment that it was an act of omission on the part of the prisoner which caused the death of the deceased.

*Campbell Foster* then contended that the facts of the case disclosed no duty between the prisoner and the public.

In this the learned JUDGE concurred, saying that, there being no clause in the act compelling Mr. Harrison to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of Mr. Harrison; and that, consequently, his negligence did not constitute such a breach of duty as to make him guilty of manslaughter.

*Prisoner discharged.*

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—*Indictment*  
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## Ireland.

## COURT OF CRIMINAL APPEAL.

January 12, 1869.

Before WHITESIDE, C.J., MONAHAN, C.J., PIGOT, C.B., DEASY, FITZGERALD, and HUGHES, BB., O'BRIEN, GEORGE, and LAWSON, JJ.)

REG. v. JOHN CLEGG.(a)

*Larceny by a bailee—Indictment.*

*M. was the owner of a wrecked ship. A. contracted with M. to save and recover the wrecked property. A. made a sub-contract with R. O. to act as diver and carry on the works of salvage; all goods saved to be forwarded to A., and the remuneration to be a percentage on the goods saved, but R. O. always to retain 150l. as a guarantee. In his absence R. O. put his son, the defendant, in charge of the wreck. The defendant corresponded with A. as to the sale of the salvage, and he was addressed by A. as a responsible party under the contract. A. deposed, however, that he had always considered R. O. as the party liable on the contract. The defendant sold and appropriated part of the salvage. The jury found that he did so animo furandi, but no question was asked them as to whether he was a bailee of A.:*

*Held (dissentientibus Fitzgerald, B., and George, J.), that there was sufficient evidence to show that the defendant was a bailee so as to make him liable for larceny under the 3rd section of the Larceny Act:*

*Held, also, that the property was rightly laid in M.*

**T**HIS was a case reserved by the Chairman of Quarter Sessions, Cork County, East Riding.

The facts are fully set out in the following statement by the learned Chairman:

The defendant in this case was tried before me at a Court of Quarter Sessions for Cork County (East Riding) at Fermoy, in the division of Middleton, on the 7th of January, 1868.

(a) Reported by W. MULHOLLAND, Esq., Barrister-at-Law.

The prosecution was instituted by a voluntary association comprising several members, and established at Liverpool for the protection of commercial interests as respects wrecked and damaged property.

The indictment charged the defendant in ten several counts with larceny.

The property comprised in the indictment consisted of iron, copper, tin, and other articles, portions of the cargo of a vessel called the *Eugenie*, and was laid in different persons as owners.

The property was laid in the first count in William Westcott Rundell; in the second count in William Westcott Rundell and others; in the third count in James Martin and Richard Martin; in the fourth count in Robert Norris Dale and Philip Henry Rathbone and others.

Messrs. Dale and Rathbone were members of the association.

Mr. Dale was the chairman, and Mr. Rathbone, vice-chairman of the association.

The *Eugenie* was wrecked on the coast of Cork, at Ballymacotter, situated within the said riding and division, in the month of December, 1865.

The Messrs. James and Richard Martin, of Dublin, were the owners of the vessel. After the wreck their men were in care of the property. They applied to the association to take charge of the wreck and cargo in order to recover the property for the benefit of the owners.

The association agreed, and appointed Captain John Flood, one of their officers, for that purpose; and the Messrs. Martin, prior to January, 1866, gave up to Flood possession of the vessel and cargo.

Flood continued for some time in charge, and William W. Rundell, a member and the secretary of the company, advertised for divers; and Richard Clegg, the father of the defendant, forwarded a tender for salvage, bearing date the 12th of January, 1866, to Rundell, which was approved of, and was signed by Richard on the 15th of that month; by this instrument Richard undertook and agreed with Rundell to proceed immediately with the salvage of the *Eugenie*, her cargo and materials, and to deliver property saved to Rundell's order in Liverpool without delay and using all despatch, working with not less than two sets of divers, to the satisfaction of Captain Cawkitt, or other agent of the said association, who might from time to time be appointed to overlook the work.

The remuneration to be for copper 20 per cent., and for iron and rough freight and ship's materials 47 per cent. on net proceeds in Liverpool of such portions as might be sold there, or on net values in Liverpool of such as might be returned to shippers or owners, the values in the latter case to be determined by the persons in said instrument named.

It was thereby further provided, that as Rundell should receive proceeds of cargo sold, or deposits in respect of cargo delivered

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to shippers or owners, he should retain thereout, and from the proportion due to the Cleggs, the sum of 150*l.* as a guarantee fund for the due fulfilment by the Cleggs of the contract, and that Rundell from time to time was to make the Cleggs payments on account of the salvage, but that he should always retain on hand at least 150*l.* until the salvage was finished as far as might be deemed practicable by Captain Cawkitt or other agent of the association.

On the receipt of this tender by Rundell he directed that the vessel and cargo should be given up to Richard, and immediately after the defendant took possession of the wreck and cargo. Robert Clegg, the defendant's uncle, acted as diver, and he and the defendant lodged together at Ballymacotter. The defendant took a store, in which the property saved was deposited, and from time to time he wrote to Rundell in reference to the salvage. The defendant was aware of the terms of the contract entered into by his father with Rundell, and knew that his father had in March, 1866, applied by letter to Rundell for permission to sell 100 tons of pig iron in Cork, as it could be sold there on better terms, and that Rundell would not allow it.

The defendant, in July, 1866, shipped a quantity of the cargo of the wreck to Liverpool, consigned to Rundell, and by letter dated the 6th of that month he apprised Rundell of the shipment.

The defendant, in September, 1866, shipped further portions of the cargo to Rundell, consisting of copper.

The defendant, in the early part of October, 1866, shipped further portions of the cargo, and on the 24th of that month the defendant shipped what he stated to be the residue of the property then saved to Rundell; and on each occasion the defendant apprised Rundell by letter of the property he had shipped and consigned to him.

The goods shipped by the defendant to Rundell were sold in Liverpool for the benefit of the owners, and produced 1097*l.* 7*s.* 6*d.* The remuneration for salvage on this sum came to 464*l.*, and after deducting the payments made from time to time by Rundell to the Cleggs, a balance of 59*l.* was due to them, and is still unpaid. The association did not retain out of the 464*l.* the sum of 150*l.* mentioned in the contract as the guarantee fund.

It was proved that in the summer of 1866 the defendant sold at the store portions of the iron to the value of a few shillings.

That in August or September in that year the defendant sold ten sheets of iron at the ship for 1*s.* 6*d.* a sheet.

That in June or July he sold eight boxes of tin on the strand near the wreck; that he was paid 5*s.* a box for three boxes, and 4*s.* 6*d.* a box for the remainder; that he sold a metal pump for 16*s.*; that he sold cord for 7*s.*; and four and a-half dozen of knives.

That in harvest, 1866, he sold iron at the ship to the value of 2*l.* 10*s.*, and more at the store to the value of 4*l.* 10*s.*; that he at the same time sold a cask of white lead for 18*s.*

That the defendant received for paint sold for him 4*l.*, and for three boxes of tin 12*s.*, and for some white lead 1*l.*

That the defendant delivered to the woman with whom he and his uncle lodged, at Ballymacotter, three tubs of knives and forks to be sold for his use. The woman sold them for 1*s.* 3*d.* a dozen, and paid the money to the defendant. The goods so disposed of were portions of the cargo of the *Eugenie*. It was proved that in October, 1866, the defendant hired a lighter, and loaded it with iron, bars of copper, and other portions of the cargo. The lighter proceeded to Cork, and about nine tons of the iron and several bars of the copper were put on board a Liverpool steamer, and consigned to Rundell. The remainder of the copper and an anchor 2½ cwt. were shipped to Glasgow.

The remainder of the iron, about 3 tons, was landed on the quay in Cork, and by defendant's directions removed on cars to the house of Mr. M'Sweeny in Cork, to whom defendant sold it for 12*l.* 5*s.* 1*d.*

The defendant received on foot of the sales made by him in Cork and at Ballymacotter a sum of about 29*l.*

It was proved that the defendant wrote to Rundell letters in reference to the cargo and the wreck, bearing date respectively the 1st, 5th, 6th, 12th, 21st, 24th of October, and on the 2nd of November, 1866, and on the 10th of June, 1867. He did not advert to the property he had sold in any of his letters, or otherwise disclose the matter to Rundell. The copper shipped to Glasgow was sold there in January, 1867, for 42*l.* Rundell, acting on information he received, wrote to Richard Clegg on the subject; and Richard wrote him a letter of apology, and remitted the 42*l.* to him, on the 28th of March, 1867. Rundell, by letter, apprised Richard that the committee had under consideration his breach of contract in reference to the Glasgow sale, and that the contract should terminate. In April, 1867, Richard wrote to say he would consent to a sale of the residue of the wreck and cargo. In May, 1867, the residue was sold for 45*l.* 12*s.* 6*d.* Rundell stated he considered Richard as the only responsible man in the transaction; but, on cross-examination, he admitted that he wrote a letter, dated the 15th of March, 1866, in reference to the wreck, addressed to Messrs. Clegg and Co., Divers. It appeared that prior to the contract in question the Cleggs had been employed by the association in reference to a wreck on the Wicklow coast, and during the year 1866 Richard had been engaged there. In consequence of private information that reached Rundell, he proceeded against the defendant at the Cloyne Petty Sessions, and in 1867 he had the defendant arrested without any previous intimation to the defendant as to the charge against him.

The documents proved are annexed hereto.

A letter from John Clegg to W. W. Rundell, dated the 10th of June, 1867, was proved and read at the trial, but has been since mislaid. In this letter the defendant stated, among other matters, that he was the person in charge of the wreck,

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that there was but one piece of block-tin saved, and that it was stolen.

That everything he saw saved was reported immediately to Rundell.

Mr. J. S. Green conducted the defence, and contended that the evidence did not establish any criminal offence against the defendant, and that I ought to direct an acquittal. I refused to do so; and Mr. Green addressed the jury, but did not call any witness for the defence.

I told the jury, in reference to the sales of portions of the cargo made by the defendant and for his use, that if they were satisfied that the defendant fraudulently took and converted that property to his own use, with the intent of depriving the owners of it, they ought to find him guilty. The jury convicted the defendant on the first, second, third, and fourth counts of the indictment, and acquitted him on the remaining six counts. Thereupon Mr. Green called on me to reserve for the decision of the Court of Criminal Appeal the following objection to the conviction:—

“That, having regard to the contract and the other circumstances in evidence, counsel for the prisoner contended that there was no criminal offence, and that the only remedy was a civil action for breach of contract.

(Signed)

“JAMES S. GREEN.”

I agreed, at Mr. Green's instance, to reserve the objection so relied on by him for the opinion of this Court.

I allowed the defendant to stand out on bail to appear to receive sentence in case the conviction should be affirmed.

D. R. KANE,

9th April, 1868.

Chairman Cork County, East Riding.

*Copies of and Extracts from the Principal Documents referred to in the Case.*

Donaghadee, January 12th, 1866.

To Mr. W. W. RUNDALL, Secretary to the Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property, Liverpool.

SIR,—For the consideration hereinafter named, I hereby undertake and agree with you to proceed immediately with the salvage of the *Eugenie* (Liverpool to St. John's, wrecked near Queenstown), her cargo and materials, delivering all we may save to your order in Liverpool without delay, and using all despatch, working with not less than two sets of divers, and to the satisfaction in all respects of Captain John Cawkitt or other agent of the said association who may be from time to time appointed to overlook the work.

The remuneration to be for copper 20 per cent., for iron and rough freight and ship's materials 47 per cent. on net proceeds in Liverpool of such portions as may be sold there, or on net values in Liverpool of such as may be returned to the shippers or owners, the values in the latter case



to be determined by Messrs. L. R. Bailly, R. Lowndes, and H. Stockley, the average adjusters engaged in this case.

It is understood that, as you receive proceeds of cargo sold or deposits in respect of cargo delivered to shippers or owners, you must first retain thereout and from the proportion of same due to us the sum of one hundred and fifty pounds as a guarantee fund for the due fulfilment by us of this contract, and that you from time to time make us payments on account of the salvage payable to us; but you are always to retain on hand at least one hundred and fifty pounds until the salvage of the ship's materials and cargo shall have been finished as far as may be deemed practicable by Captain Cawkitt or other agent of the said association who may be appointed to act in his place.

Witness to the signature of

(Signed)

RICHARD CLEGG,

15th January, 1866.

Witness present—HUGH NORWELL.

Ballymacotter, Cloyne, 22nd February, 1866.

W. W. RUNDELL, Esq.

DEAR SIR,—We got commenced operations yesterday at last. We recovered about 11 tons of bare iron, and about 10cwt. of yellow metal. I hope soon to have 110 tons saved to send to you.

Please would you drop me a line concerning what is in Mr. Terry's store, as the salvors want their money. The ropes are not worth much, as they are all loss and cut to pieces. There is five parts of coils, and eleven sheets of light iron. What salvage might be right for saving of same?

I remain your obedient servant,

(Signed)

JOHN CLEGG.

P.S.—I had a letter from father last night, stating that nothing can be done at Arklow Bank. Ship completely sanded up. Please to write me in case of Mr. Terry.

Association for the Protection of Commercial Interests as respects Wrecked  
and Damaged Property.

Liverpool, March 15th, 1866,  
Underwriters' Rooms.

Messrs. CLEGG and Co., Divers, Ballycraheen.

*Eugenie.*

DEAR SIRS,—I have no letter from you since February 22nd, and am anxious to hear how you are getting on with the salvage, and particulars of what you have recovered to this time.

Yours very faithfully,

(Signed)

W. W. RUNDELL, Secretary.

Ballymacotter, Cloyne, 19 March, 1866.

W. W. RUNDELL, Esq.

DEAR SIR,—I have your favour of 15th. The weather has been rather against us this time past.

Yours truly,

(Signed)

JOHN CLEGG.

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bailee—  
Indictment.*

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bailees—  
Indictment.*

W. W. RUNDSELL, Esq.

Warren's-place, Cork, 6th July, 1866.

DEAR SIR,—The present is to say that I have shipped on board of the schooner *Thomas Mason*, of Bangor, John Pugh, master, a quantity of cargo from the wreck *Eugenie*, consisting of 4317 bundles of bars, and sheets, and pigs of iron, and eight cases of steel, all complete, and twelve lengths of large chain cable; also one long chain, weight 17cwt. 2qrs., which you will please pay Captain Pugh the freight, 5s. per ton, and which he has got five days to discharge, if longer, 1l. 10s. per day demurrage.

I remain your obedient servant,  
(Signed) JOHN CLEGG.

Ballymacotter, 25th August, 1866.

W. W. RUNDSELL, Esq.

DEAR SIR,—The present is to say that the weather is still against our operations ever since I wrote to you last. I intend to save all I can before I send any to Liverpool.

I remain your obedient servant,  
(Signed) J. CLEGG.

P.S.—Sir, there is no description of cargo to be seen but the heavy goods, the tin and ropes is all gone, and I think the most of the yellow metal, and as for hard wire and nails, all is broken up and all along the rocks of no use. Such a rough place I never seen before.

Ballymacotter, Cloyne, 7th September, 1866.

W. W. RUNDSELL, Esq.

DEAR SIR,—We are recovering all we can to-day, but the sea is frightful bad, yet please to let me know what I shall do with the timber. Shall I make sale of it or not; and whether by public or private sale? Please to inform me in the matter.

I remain your obedient servant,  
(Signed) JOHN CLEGG.

(Not dated, but supposed to have been written on 16th September, 1866.)

Captain JOHN FLOOD.

SIR,—My opinion is as regarding sale of the cargo that may now lie belonging to the wreck *Eugenie*, at Ballymacotter.

That my father won't have any objection to it if you wish, but if you don't sell we are quite willing to put a watchman on her for the winter, as no good *can* be done here now till the month of March. So as to my opinion I think the best thing is to sell under such circumstances as we are placed here.

But hoping that you will look into the matter carefully, as you are the best judge.

(Signed) JOHN CLEGG.

Captain J. FLOOD, Agent for Underwriters, Liverpool.

List of Cargo recovered from Wreck *Eugenie*, at Ballymacotter :—

60 tons of iron, including pig  
iron, as near as I can  
gauge.  
25 anchors, large and small.  
2 lengths of chain cable.  
2 small chains.

8 cases of yellow metal.  
64 bars of same.  
3 cases of steel.  
20 plates of same.  
15 steel springs, and  
lot of loose ropes.

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Ballymacotter, Oloyne, 22nd September, 1866.

W. W. RUNDALL, Esq.

DEAR SIR,—Your note was handed to me by Captain John Flood on the 15th inst. I gave him all the information that was in my power, as regarding what you mentioned in your letter, and to what he thought was best to be done he advised me. I am very busy at present getting the copper put up to send by next steamer. I have got no account of any vessel yet for the iron. The weather is very wild here this long time. Captain Flood told me to send you an account of what I would be offered for the remainder of the hull of the *Eugenie*. I am offered 7*l.* by one party and 8*l.* by another. This is all the proposals I have got at present.

I remain your obedient servant,

(Signed) JOHN OLEGG.

W. W. RUNDALL, Esq., Underwriters' Room, Liverpool.

Ballymacotter, Oloyne, 1st October, 1866.

W. W. RUNDALL, Esq.

DEAR SIR,—The present is to say that I have not got any vessel yet, but expect to get one this week. I am rather uneasy about the yellow metal, not hearing whether you received it all right or not.

I have got no other offer for the timber, but Mr. Terry came and offered me three pounds. I told him he had had no chance of it at the same money, I don't think that we will get more nor the 8*l.*

Waiting your reply,

I remain your obedient servant,

(Signed) JOHN OLEGG.

P.S.—Sir, since I wrote this I got a letter stating that my broker got a schooner.

October 4th, 1866.

Mr. JOHN OLEGG, Ballymacotter, Oloyne.

*Eugenie.*

DEAR SIR,—I am glad to find by the postscript to your note of October 1st, received yesterday, that you have succeeded in getting a vessel to bring in the iron, &c. Please send me name and particulars of the vessel to enable me to effect the insurance which you requested.

The steamer with the copper, &c., arrived here on Monday.

The committee think you should be allowed to sell the part of the vessel which was seen by Captain Flood for 8*l.*, and apply the proceeds as part payment to Mr. R. Olegg, your father, if he is willing. I have written to Messrs. John Martin and Son, Dublin, the owners of the vessel, and requested them to write to you to say if they concur in the proposed sale. Please wait their instructions before you sell.

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How much do you value the iron at which you are going to send forward? I ask this to be able to insure according to your wishes.

Yours, dear sir, very faithfully,

W. W. RUNDALL, Secretary.

Ballymacotter, Cloyne, 5th October, 1866.

W. W. RUNDALL, Esq., Secretary, Underwriters' Rooms, Liverpool.

DEAR SIR,—The present is to say that we will commence to ship the iron either on Saturday or Monday first; the vessel will be ready to night, I think. Please will you let me know whether you will be able to insure the iron for me, in case of any accident going to Liverpool. We will have her loaded, say on Thursday. I got no other offer for the timber. I don't think anything more will be got for it.

Waiting your reply,

I am, dear sir, your obedient servant,

(Signed)

JOHN CLEGG.

October 15th, 1866.

Mr. JOHN CLEGG, Diver of Donaghadee, at Ballymacotter.

DEAR SIR,—I have your letter with B/L for the shipment by the *Qui Vive*. The insurance has been done for you at 10s. % on 500l. value as may appear.

As regards your inquiry about forwarding the six tons iron which remain, I would suggest your trying to make terms with the Steam Packet Company to bring it on with the copper, so as to clear up as far as possible to the present time. The costs of storage will, perhaps, be equal to the difference in freight, if you decide to keep the iron for another opportunity. As the forwarding is at your expense, I can only offer this advice for your consideration.

The weather here has been very calm for some time. I hope it is the same with you, and that you will be able to continue your salvage operations for several weeks yet, before winter compels you to leave off for a time.

Yours very truly,  
(Signed)

W. W. RUNDALL, Secretary.

October 22, 1866.

Mr. JOHN CLEGG, Ballymacotter.

*Eugenie.*

DEAR SIR,—I note that you are sending forward the copper and iron which remains by steamer from Cork, and that you purpose to leave for the winter. I hope that you will arrange for such watch on the wreck as you consider necessary during your absence.

Messrs. John Martin and Son ought not to have taken the money for the wreck which came in, but should have paid it to you on account as I requested.

They must account to me for the amount, and pay salvage to you on the gross sum received: you, out of the portion due to you, paying all expenses.

The *Qui Vive* has arrived, and been put into a berth to discharge cargo.

Yours, dear sir, very faithfully,

W. W. RUNDALL, Secretary.

Association for the Protection of Commercial Interests as respects Wrecked  
and Damaged Property.

Liverpool, January 23rd, 1867.  
Underwriters' Rooms.

Mr. R. CLEGG, Diver, Donaghadee.

*Eugenie.*

SIR,—I am in receipt of your letter of the 19th inst. from Glasgow, and consider your explanation respecting the sale there of the metal rods is altogether very unsatisfactory. I shall bring your letter and other circumstances on this subject before the committee at their first meeting, and meantime I would recommend you to at once remit to me the 42*l.* which you speak of, and any other money which you may hold belonging to me under your contract of January 12th last. I do not know what the committee will think of this matter; so you must clearly understand that I shall be compelled to take any steps against you which they may direct under the advice of their solicitor.

I am, sir, yours very obediently,  
W. W. RUNDALL, Secretary.

Association for the Protection of Commercial Interests as respects Wrecked  
and Damaged Property.

Underwriters' Rooms, Liverpool, March 28th, 1867.

Mr. RICHARD CLEGG, Donaghadee.

*Eugenie.*

SIR,—I am directed to inform you that the committee have had under consideration to-day your breach of contract in taking a portion of the cargo of this vessel to the Clyde, and selling it there without their knowledge; and they are of opinion that the contract should be considered as closed, and that the residue of this wreck should now be offered for sale by auction.

I am, sir, your obedient servant,  
W. W. RUNDALL, Secretary.

*J. A. Wall, Q.C., and J. S. Green, for the prisoner.*—The original taking was not wrongful, and therefore the case must be brought under 24 & 25 Vict. c. 96, s. 3, which concerns larceny by a bailee. The defendant was not a bailee. The specific thing bailed was not to be returned, but the cargo was to be sold. The defendant was civilly liable on his contract, but not criminally: (*Reg. v. Hassall*, 8 Cox Crim. Cas. 491; *Reg. v. Hoare*, 6 F. & F. 647; *Reg. v. Garrett*, 2 F. & F. 14.) The Messrs. Martin and the association were bailees only; they parted with the possession voluntarily, and their bailment ended there. [Pigot, C.B.—No; because they parted with the possession only for a specific purpose. If the defendant is liable criminally, it is for larceny as a servant, the property being laid in Richard Clegg, the father.] They also cited Abbott on Shipping, 558, 574—79; *Reg. v. Preston* (5 Cox Crim. Cas. 390). They also contended that there was not sufficient evidence of property. The property was in the owners of the cargo, and

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there is no count laying it in them. [PIGOT, C.B.—That point was not made below.]

The *Solicitor-General* (Barry) and *T. J. Wall*, for the Crown. —This is larceny by a bailee under 24 & 25 Vict. c. 96, s. 3. The jury have found the criminal intent. The only question is whether the defendant was a bailee. The contract and subsequent letters are ample evidence of these facts. [FITZGERALD, B.—The contract was with the father. If the defendant was a bailee the contract does not show it.] As to larceny by a bailee they cited *Reg. v. Bunkall* (9 Cox Crim. Cas. 419), *Reg. v. Davies* (10 Cox Crim. Cas. 239), and *Reg. v. Robson* (9 Cox Crim. Cas. 29).

*Our ad vult.*

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January 15, 1869.

The judgment of the majority of the Court (WHITESIDE and MONAHAN, C.JJ., PIGOT, C.B., O'BRIEN, FITZGERALD, and LAWSON, JJ., and HUGHES, B.) was delivered by

WHITESIDE, C.J.—In this case the majority of the Court consider the facts stated sufficient to support the conviction under the 24 & 25 Vict. c. 96, s. 3. There is abundant evidence that the defendant filled the position of a bailee, especially in the letter written by him to Mr. Rundell. As to the objection made by ingenious counsel that there was not evidence to sustain the laying of the property as it has been laid in the indictment, that cannot prevail. No such point was made below. But, on the evidence, we think the count laying the property in the Messrs. Martin sufficiently sustained. Even if they were not owners of the cargo they were owners of the ship, and that is sufficient for this case.

FITZGERALD, B.—I have the misfortune to differ from the majority of the Court. The learned Chairman told the jury that if they believed that the defendant fraudulently took and converted the property to his own use, with the intent of defrauding the owners of it, they ought to find him guilty. In plain words, the prisoner's intent was the only question submitted to the jury. The question for us to consider is, whether taking the contract and the evidence in connection, there was any criminal offence; whether there were facts proved beyond dispute which, taken in connection with the finding as to the intention, would make the defendant guilty of larceny. I assume there was evidence from which a jury might have inferred that the defendant was a bailee; the express contract was with Richard Clegg. If the jury had been asked whether they considered the defendant a bailee, and had answered in the affirmative, that, taken in conjunction with their finding on the intention, would have been sufficient to sustain a conviction for larceny; but no such question was left to the jury. It is true that if the evidence disprove every state of facts consistent with the innocence of the defendant, he is not



to question the conviction ; but I think the evidence is not inconsistent with the defendant's innocence. If he were not a bailee he could not be convicted under this indictment ; he must have been indicted for larceny as a servant of Richard Clegg, under the 68th section of the Larceny Act. And there was evidence of how the defendant became possessed ; whether he was a servant of Richard Clegg, or as himself bailee, or as a stranger. For these reasons I think the conviction should be quashed.

GEORGE, J.—I also differ from the majority of the Court. The defendant was, I think, the servant of Richard Clegg, who was, perhaps, the bailee of the association. The defendant is not guilty of larceny at common law, as his possession was not originally wrongful. To make him guilty of larceny as a bailee, a bailment must be proved as existing between him and some of the parties in whom the property is laid. This does not appear to me to have been proved, and the jury have not found any question on it.

*Conviction affirmed.*

Attorney for the Crown, *The Crown Solicitor.*

Attorney for the prisoner, *John Mone.*

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JOHN CLEGG.  
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1869.  
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Indictment.*

**Ireland.****COURT OF CRIMINAL APPEAL.**

*February 22, 1869.*

(Before WHITESIDE, C.J., HUGHES and DEASY, BB., and FITZGERALD and GEORGE, JJ.)

REG. v. LAWRENCE GARLAND.(a)

*Misdemeanor—Previous conviction for felony.*

*It is not competent for a prosecutor in an indictment for misdemeanor to charge a previous conviction of the accused for felony, and support that charge by such evidence as is authorised by 24 & 25 Vict. c. 96, s. 116: (Reg. v. Summers, 19 L. T. N. S. 799, C. Cas. R.; 3 W. N. 34.)*

*When a conviction founded on such an indictment comes before this Court, such conviction must be quashed, as the Court has no power to amend the indictment.*

**T**HIS was a case reserved by the Chairman of the Quarter Sessions of the County of Louth.

The case stated by the learned Chairman is as follows:—

At the Quarter Sessions held at Dundalk on the 8th day of January, 1869, for that division of the county of Louth, before me as Chairman of Quarter Sessions for said county, and John Murphy, Robert C. Coote, and Michael Kelly, Esqrs., Justices of the Peace for said county, Lawrence Garland was indicted for having on the 6th of October, 1868, obtained money by false pretences (hereinafter called "the subsequent offence").

The said indictment, after charging "the subsequent offence," went on to state that the said Lawrence Garland had, on the 3rd day of December, in the thirtieth year of the reign of Her present Majesty, been convicted of felony, at Lincoln, in England.

A copy of the said indictment is hereunto annexed.

The said Lawrence Garland was undefended.

(a) Reported by W. MULROLLAND, Esq., Barrister-at-Law.

The said Lawrence Garland having been arraigned upon so much only of the said indictment as charged "the subsequent offence," and having pleaded "not guilty" thereto, was upon trial convicted.

The said Lawrence Garland having been so convicted, the sessional Crown prosecutor called upon the clerk of the peace to ask the prisoner (L. Garland) whether he had been previously convicted of felony as alleged in the said indictment.

I entertained doubt whether it was competent for the Crown to charge or state a previous conviction for felony in an indictment for the misdemeanor of having obtained money by false pretences, and whether the prisoner should be called on to plead to such a charge, or whether evidence should be received against him of such alleged previous conviction.

It was contended on behalf of the Crown that, upon the true construction of the 116th section of the 24 & 25 Vict. c. 96, and of the concluding enactment of the 2nd section of the 27 & 28 Vict. c. 47, the previous conviction for felony might be charged in, and proved under, this indictment, as in the case of simple larceny, after a previous conviction for felony: (see also sects. 6, 7, and 8 of 24 & 25 Vict. c. 96.)

Although I was of opinion that in this case the charge of a previous felony ought not to have been introduced into this indictment, still, at the urgent request of the sessional Crown prosecutor, I allowed (subject to the opinion of this Court upon my doing so) the prisoner to be called on to say whether he had been so previously convicted as alleged. He pleaded not guilty.

The sessional Crown prosecutor then gave such evidence as is authorised by the 116th section of the 24 & 25 Vict. c. 96, of the alleged previous conviction, and also evidence of the identity of the prisoner with the person so previously convicted. The jury having thereupon found the prisoner guilty, he was sentenced to eight months' imprisonment with hard labour; the sentence being increased by two months in consequence of such previous conviction.

The question for the Court is: Is it competent for a prosecutor in an indictment for the misdemeanor of obtaining money by false pretences, to charge a previous conviction of the accused for felony, and to support such charge by such evidence as is authorised by the 24 & 25 Vict. c. 96, s. 116?

J. C. NELIGAN,

Chairman of Quarter Sessions for County of Louth.

Received 20th of January, 1869.

*Copy of Indictment.*

County of Louth, } The jurors for our Sovereign Lady the  
to wit. } Queen, upon their oath, do say and present,  
that Lawrence Garland, on the 6th day of October, in the year  
of our Lord 1868, unlawfully, knowingly, and designedly did  
falsely pretend to one John M'Gavock, a sub-constable of

REG.  
v.  
LAWRENCE  
GARLAND.

1869.

Pleading—  
Indictment—  
Previous  
conviction.

**Ireland.****COURT OF CRIMINAL APPEAL.**

*February 22, 1869.*

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REG. v. LAWRENCE GARLAND. (a)

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The said Lawrence Garland having been so convicted, the sessional Crown prosecutor called upon the clerk of the peace to ask the prisoner (L. Garland) whether he had been previously convicted of felony as alleged in the said indictment.

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It was contended on behalf of the Crown that, upon the true construction of the 116th section of the 24 & 25 Vict. c. 96, and of the concluding enactment of the 2nd section of the 27 & 28 Vict. c. 47, the previous conviction for felony might be charged in, and proved under, this indictment, as in the case of simple larceny, after a previous conviction for felony: (see also sects. 6, 7, and 8 of 24 & 25 Vict. c. 96.)

Although I was of opinion that in this case the charge of a previous felony ought not to have been introduced into this indictment, still, at the urgent request of the sessional Crown prosecutor, I allowed (subject to the opinion of this Court upon my doing so) the prisoner to be called on to say whether he had been so previously convicted as alleged. He pleaded not guilty.

The sessional Crown prosecutor then gave such evidence as is authorised by the 116th section of the 24 & 25 Vict. c. 96, of the alleged previous conviction, and also evidence of the identity of the prisoner with the person so previously convicted. The jury having thereupon found the prisoner guilty, he was sentenced to eight months' imprisonment with hard labour; the sentence being increased by two months in consequence of such previous conviction.

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J. C. NELIGAN,

Chairman of Quarter Sessions for County of Louth.

Received 20th of January, 1869.

*Copy of Indictment.*

County of Louth, } The jurors for our Sovereign Lady the  
to wit. } Queen, upon their oath, do say and present,  
that Lawrence Garland, on the 6th day of October, in the year  
of our Lord 1868, unlawfully, knowingly, and designedly did  
falsely pretend to one John M'Gavock, a sub-constable of

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v.  
LAWRENCE  
GARLAND.

1869.

Pleading—  
Indictment—  
Previous  
conviction.

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1869.

Pleading—  
Indictment—  
Previous  
conviction.

constabulary, that the statement contained in a certain written paper then produced by the said Lawrence Garland to the said John M'Gavock; that is to say, that on the 2nd day of May, in the year aforesaid, the house of him, the said Lawrence Garland, was burned, and seventeen shirts, eleven pair of stockings, the whole of the furniture of said house, forty-eight pounds weight of wool, and the produce of two bushels and a half of flax seed, the property of the said Lawrence Garland, were then burned and consumed in the said house, to the loss of the said Lawrence Garland of 60*l.* sterling and upwards, was a true statement. By means of which said false pretences, he, the said Lawrence Garland, did then unlawfully obtain from the said John M'Gavock, the sum of sixpence in money, the money of the said John M'Gavock, with intent then to defraud: Whereas, in truth and in fact, the said statement so contained in the said written paper, was not a true statement, but was false and untrue: And whereas, in truth and in fact, the said house of the said Lawrence Garland was not burned on the said 2nd day of May, in the year aforesaid, or at any other time: And whereas, in truth and in fact, seventeen shirts, eleven pair of stockings, the whole furniture of said house, forty-eight pounds weight of wool, the produce of two bushels and a half of flax seed, the property of the said Lawrence Garland, or any other property, were not, or was not, then, or at any other time, burned or consumed in the said house, to the great damage and deception of the said John M'Gavock, to the evil example of all others in the like case offending. And the jurors aforesaid, upon their oath aforesaid, do further present that before the committing of the misdemeanor above mentioned, to wit, at the Assizes and general delivery of the gaol of our Lady the Queen, holden at Lincoln, in and for the county of Lincoln, in England, on the 3rd day of December, in the thirtieth year of Her present Majesty's reign, he, the said Lawrence Garland, was convicted of felony, and which said conviction is still in full force, strength, and effect, and not in the least reversed, annulled, or made void against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown, and her dignity.

*Monroe* and *W. Griffin*, for the prisoner, cited *Reg. v. Summers* (19 L. T. N. S. 799, C. Cas. R.), where it is stated "that it is not the practice to insert a previous conviction of felony in an indictment for a misdemeanor without some authority by statute, as it would be error on the record." They contended that there was error here, and that the Court of Crown Cases Reserved had only the authority derived from the statute constituting it (11 & 12 Vict. c. 78), and this authority only empowers them to reverse, affirm, or amend the judgment. If the judgment be amended here there will be error on the record, as it will not be a proper judgment on the indictment as it stands.



The *Solicitor-General* (Barry) and *W. Johnson*, for the Crown.

WHITESIDE, C.J.—The Court are unanimous in ordering this conviction to be quashed. We are of opinion that the statute does not intend to allow a previous conviction for felony to be charged in an indictment for felony. That has been done here, and our powers do not extend to amending the indictment. We can only deal with the judgment; and if we amend the judgment here the record will be wrong.

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v.  
LAWRENCE  
GARLAND.  
—  
1869.  
—  
Pleading—  
Indictment—  
Previous  
conviction.

*Conviction quashed.*

Attorney for the Crown, *The Crown Solicitor*.

Attorney for the prisoner, *Burton Booth*.

## Ireland.

### COURT OF CRIMINAL APPEAL.

*January 13, 1869.*

(Before WHITESIDE, C.J., PIGOT, C.B., O'BRIEN, FITZGERALD, and GEORGE, JJ., and FITZGERALD and HUGHES, BB.)

REG. v. MARTHA DEAVES. (a)

*Larceny by finding.*

*The prisoner's child found six sovereigns in the street, which she brought to the prisoner. The latter counted it, and told some bystanders that the child had found a sovereign, and offered to treat them. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. Two hours afterwards the owner made hue-and-cry in the vicinity. On the same evening the prisoner was told that a woman had lost money; the prisoner told her informant to mind her own business, and gave her half a sovereign for herself. Prisoner admitted, on arrest, that she had got the money from the child:*

*Held, that these facts did not warrant a conviction for larceny, as there was nothing to show that at the time of the finding the prisoner had reason to think that the owner could be found (FITZGERALD, J., PIGOT, C.B., and FITZGERALD, B., dissentientibus). Reg. v. Glyde discussed.*

THIS was a case reserved by Mr. Justice Fitzgerald. The facts fully appear from the following report of the learned Judge:

(a) Reported by W. MULHOLLAND, Esq., Barrister-at-Law.

REG.  
v.  
MARTHA  
DEAVES.

1869.

*Larceny by  
finding.*

Martha Deaves was tried at the last Summer Assizes for the City of Cork on an indictment charging her with the larceny of money, the property of Ellen Cotter.

She was defended by Mr. Upington.

The evidence established that on the evening of Monday, the 20th of July, 1868, about eight o'clock, Ellen Cotter had dropped in Paul-street, in the city of Cork, a sum of 13*l.* in gold, then contained in a small white calico bag. In about two hours afterwards she missed the money, and returned to Paul-street about 10 p.m. the same evening, and made hue-and-cry of her loss amongst the people of the vicinity.

There was sufficient evidence that about half-past eight the same evening one of the prisoner's children, a girl of about seven years of age, found a part of the money, viz., 6*l.*, near the place where it had been dropped, and brought it into the house to the prisoner, and gave it to her; the latter counted it, and represented to one of the bystanders that her child had found a sovereign, and said she would give the parties present a treat of porter.

The prisoner and her child then went down to the street where the same child, in the same place, found a half sovereign and a white calico bag. She gave the half sovereign to her mother, and had at the time the bag in her hand, but it did not appear that she gave the bag to her mother.

A witness, who was present when the prisoner got the money from her child, deposed that about two hours afterwards she met Ellen Cotter on the footpath lamenting her loss and spoke to her; that on the same evening witness told the prisoner that she had seen the woman lamenting the loss of her money in Paul-street, that she was a poor woman, and that witness believed she lived in Harcourt-lane; the prisoner in reply told witness to mind her own business. The next day prisoner gave witness half a sovereign of the money for herself; witness then told her that there were police or detectives on the look out.

The prisoner was arrested on the 23rd of July; no money was found with her, but she admitted she received 6*l.* 10*s.* from the child.

No portion of the money was ever restored to Ellen Cotter.

The evidence for the prosecution having closed, Mr. Upington, for the prisoner, insisted that I should direct an acquittal.

I declined to do so.

In reply to questions put by me to the jury, they found—(1) That the 6*l.* 10*s.* found by the prisoner's child was part of the money lost by Ellen Cotter; and (2) that at the time when the money was received by the prisoner from her child, she had reasonable ground for believing, and did believe, that the owner of the money could be found.

Mr. Upington objected that there was no evidence to sustain the second finding.

Upon these special findings I then instructed the jury that if they were satisfied by the evidence that at the time the prisoner

received the money from her child as aforesaid she took possession of it, intending at the time to appropriate it to her own use, without regard to whether the owner could or could not be discovered, and did afterwards so appropriate it, they were at liberty, on such evidence, to find her guilty of larceny.

The jury returned a verdict of guilty.

At the request of Mr. Upington, for the prisoner, I deferred sentence until the next assizes, and reserved for the consideration of this Court the question whether the conviction was proper under the circumstances aforesaid.

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*Upington*, for the prisoner.—This conviction cannot be upheld. The learned Judge ought to have left another question to the jury, viz., “Had the prisoner at the time of finding the money the *immediate* means of knowing that the property had an owner?” Without an affirmative answer to this question the second finding of the jury is valueless. No doubt the doctrine laid down by Coke (3 Inst. pp. 98 and 108), Hale (Pleas of the Crown, vol. i. p. 506), and Hawkins (Pleas of the Crown, vol. i. p. 142) has undergone a considerable modification in recent times, but not to any such extent as must be contended for in order to support this conviction. In all the decisions on this subject a clear distinction is drawn between cases where the owner of the lost chattel is apparent, and cases where the owner is not apparent; or, in other words, the law seems to be that to make the subsequent appropriation amount to larceny, there must either be some mark on the property, from which it may be inferred that the finder knew at the time of the finding that the property had an owner, or there must be some circumstance attending the finding from which the same inference could be drawn. In the present case the finding was admittedly a *bonâ fide* finding, which distinguishes it from *Reg. v. Moore* (8 Cox Crim. Cas. 416), and as the money was altogether in gold there could be no mark upon it which would lead to identification; the prisoner, therefore, could not be guilty of larceny, and the party by whom the money was lost should have proceeded by civil action: (*Rex v. Beard*, Jebb C. and P. Cas. 9; *Merry v. Green*, 7 M. & W. 623; *Reg. v. Peters*, 1 C. & K. 245; *Reg. v. Mole*, 1 C. & K. 417; *Reg. v. Thurborn*, 1 Den. C. C. R. 387; *Reg. v. Preston*, 2 Den. C. C. R. 353; *Reg. v. Dixon*, 7 Cox Crim. Cas. 35; *Reg. v. Shea*, 1 Ir. Jur. N. S. 244; *Reg. v. Christopher*, 8 Cox Crim. Cas. 91; *Reg. v. Moore*.) If it should be held that it was not necessary to leave to the jury the question of whether or not the prisoner had the *immediate* means of knowing that the lost property had an owner the conviction is still bad, because of there having been no evidence given to support the second finding of the jury. *Reg. v. Glyde* (1 Law Rep. C. Cas. R. 139) is a precisely analogous case. No more evidence was given in the present case than in *Reg. v. Glyde* to show belief on the part of the prisoner that the owner of the money could be found, and there it was held that the want of such evidence was

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fatal, and that the conviction could not stand. It would be highly dangerous to allow juries to speculate on what may be passing through a person's mind. Some evidence must be given.

*Brady*, Q. C. (with him *E. Barry*), for the Crown.—The rule laid down in *Reg. v. Thurborn* has been strictly followed here. The desire on the part of the prisoner to conceal the amount of money found is sufficient evidence to show that the prisoner expected that the owner of the money would make inquiries for it. This case is therefore distinguishable from *Reg. v. Glyde*, for in that case there was no evidence whatever to show that the prisoner believed that the owner of the money could be found.

WHITESIDE, C.J.—Although the principles laid down by Coke and Hale have been somewhat modified, it would be a mistake to suppose that they have been completely overturned. The rule that every larceny must include a trespass has never been controverted, and, as I think there was no trespass in taking these sovereigns, the prisoner ought not to have been found guilty of larceny. In *Reg. v. Thurborn* the jury found as the jury did in this case, but although that case seems to me to have been a stronger one for a conviction than the present, the conviction was held to be bad. *Reg. v. Preston* was also a stronger case for a conviction than the present. *Reg. v. Glyde* cannot be distinguished from the case now before us. There is nothing to show that at the time the child brought in the money the prisoner knew the property had an owner, or, at all events, to show that she was under the impression that the owner could be found. I therefore think the conviction ought to be quashed.

<sup>1</sup> FITZGERALD, J.—I think the conviction should be maintained. This case comes within the rule laid down in *Reg. v. Thurborn* by Parke, B. There is quite enough evidence to show that the prisoner believed that the owner of the money could be found. Her first act was to conceal the amount and to buy the silence of those who knew that she had gotten the money. *Reg. v. Glyde* is no authority to quash this conviction, inasmuch as there was no evidence in that case to show belief on the prisoner's part that the owner of the money could be found, while the smallness of the amount raised the presumption of abandonment. In this case all the three ingredients spoken of by Wightman, J., in *Reg. v. Moore*, are present. It is quite unnecessary to discuss the earlier authorities.

PIGOT, C.B., and FITZGERALD, B., concurred with Fitzgerald, J.

O'BRIEN, J.—The Legislature ought to interfere, as it has already done in the case of bailees. However, as the law at present stands, we are bound by *Reg. v. Thurborn* and *Reg. v. Glyde*. The conviction must be quashed.

HUGHES, B., and GEORGE, J., concurred with Whiteside, C.J., and O'Brien, J.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*January 23, 1869.*

(Before BOVILL, C.J., CHANNELL, B., BYLES, J., PIGOTT, B., and LUSH, J.)

REG. v. THE INHABITANTS OF NEWBOLD.(a)

*Highway—Repair—Evidence as to liability of parish to repair.*

*On an indictment against a township for non-repair of a common and ancient highway, it was proved that the lane had always been used as a common highway, but it was admitted that the township had never repaired this particular highway, and that it had been repaired by private persons occasionally :*

*Held, that the highway being in use previous to the 5 & 6 Will. 4, c. 50. s. 23, proof of repair by the township was not necessary to support a conviction.*

CASE reserved for the opinion of this Court at the General Quarter Sessions of the Peace for the county of Derby, held before me on the 30th of June, 1868.

The inhabitants of the township of Newbold were tried upon an indictment which charged them with neglecting to repair a common and ancient highway called Pothouse-lane, and pleaded not guilty.

It was proved that the lane in question had always been used as a common highway ; that it was situate in the defendants' township ; and that the inhabitants of that township had always been accustomed to repair the several highways situate in the township, and appointed their own surveyors for that purpose.

It was admitted, however, that the defendants had never repaired the highway, but that it had been repaired occasionally by private individuals who desired to use it.

These facts were not disputed by the defendants, but it was objected by counsel on their behalf that they could not be convicted in the absence of any evidence that they had ever repaired the particular highway which formed the subject of the indictment then being tried.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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I overruled the objection, and directed the jury that no such evidence was necessary.

The jury returned a verdict of guilty, but I deferred sentence, and, at the request of the counsel for the defendants, have stated this case for the opinion of the Court for Crown Cases Reserved.

If the Court shall be of opinion that my direction was right in point of law, the conviction is to stand. If the Court shall be of the contrary opinion the conviction is to be quashed.

Dated the 13th of November 1868.

T. W. EVANS,  
Chairman of Quarter Sessions for the  
County of Derby.

*J. W. Mellor*, for the defendants.—It is submitted that the conviction was wrong. The question is whether the mere user of the lane as a common highway is sufficient to cast on the inhabitants of the township the obligation to repair it. There was no other evidence except that of user, and it is not found that it was an ancient highway. [CHANNELL, B.—The case states that it had “always” been used as a common highway; that is very like a statement that it was an ancient highway.] That is giving a large meaning to the word “always.” It ought to have been found that it was an ancient highway. [BOVILL, C. J.—The only point reserved for us is whether it was necessary to prove that the township had repaired this particular highway. No point was raised as to its not being an ancient highway.] To throw the obligation to repair on the township there should have been some evidence of adoption or recognition of the highway by the township. [BOVILL, C. J.—That would have been a good argument if the highway had been made since 5 & 6 Will. 4, c. 50, s. 23. The words in the case, “always used as a highway,” take you back to one day at least before that statute.] In *Rex v. The Inhabitants of St. Benedict* (4 B. & Ald. 447), it was held that where a road was set out by commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years, this was not sufficient evidence of a dedication to the public, and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish was bound to repair. Bayley, J., said in that case “I do not accede to the doctrine that because there is a dedication of the road by the owner of the soil, and the public use it, that the parish is therefore bound to repair. I think there ought to be in addition to that, evidence of an acquiescence by the parish in that dedication. . . . In the case of a parish they have no power to prevent the opening of a road or to obstruct the public use of it. It would be most unjust if, by the public use of what was at first a private road, the burden of repairing it could be removed from the person to whom the use of it was at first confined, and cast upon the parish.” The case was followed by *Reg. v. Cumberworth* (3 B.



& Adol. 108), where *Reg. v. St. Benedict* was recognised by the Court, and Lord Tenterden, C. J., and Taunton, J., in their judgments, point out that acquiescence or adoption by the parish is necessary to cast on them the liability to repair. It is true that in *Reg. v. The Inhabitants of Leake* (5 B. & Adol. 469), the authority of these cases was shaken, but they were not overruled, and Parke, B. said: "The absence of repair by the parish is indeed a strong circumstance in point of evidence to prove that the road is not a public one. The fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing its acquiescence is in my opinion immaterial in every other point of view. The judgment of Bayley, J., in the case of *Rex v. St. Benedict* was cited on the argument as an authority to the contrary; but, with every respect for that very learned judge, I must say I cannot accede to the doctrine there laid down, and I am not aware that there is any authority in support of it."

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*Cave*, for the prosecutors, was not called upon.

BOVILL, C. J.—The only point reserved for us is whether it was essential to sustain the indictment against the township for the non-repair of this highway to prove that the township had previously repaired it. We are all of opinion that the fact that it had not been repaired by the township previously was only a circumstance to be weighed with the other evidence, and no more. It may have been very material evidence in the case. Ever since *Reg. v. Leake* (a) it has been considered to be the law that it is not essential to prove that a highway in use before the 5 & 6 Will. 4, c. 50, s. 23, should have been repaired by the parish in order to support an indictment against the parish for the non-repair. That being so, the present conviction is right.

The rest of the Court concurred.

*Conviction affirmed.*

(a) See, also, *Reg. v. The Inhabitants of Horley* (8 L. T. Rep. N. S. 882).

## COURT OF CRIMINAL APPEAL.

January 28, 1869.

(Before BOVILL, C.J., CHANNELL, B., BYLES, J., PIGOTT, B., and LUSH, J.)

REG. v. JOHN FIRTH.(a)

*Larceny—Continuous act—24 & 25 Vict. c. 96, s. 6.*

*By means of a secret junction pipe with the main of a gas company a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years :*

*Held, on an indictment for stealing 1000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time ; and that the 24 & 25 Vict. c. 96, as to the prosecutor's electing on three separate takings within six months did not apply.*

CASE reserved for the opinion of this Court at the Midsummer Quarter Sessions of the Peace for the West Riding of Yorkshire, holden by adjournment at Wakefield, on the 17th of August, 1868.

The indictment charged the prisoner with stealing 1000 cubic feet of carburetted hydrogen gas, the property of the mayor, aldermen, and burgesses of the borough of Halifax. The offence was alleged to have been committed on the 30th of April, 1866.

On the evidence for the prosecution it appeared that the corporation of Halifax are the owners of the gas works within the borough, and that a firm of Samuel and John Firth, worsted manufacturers, had for some years been the occupiers of Lily-lane Mill, in Halifax, which was lighted with gas, supplied by the corporation by meter ; that John Firth died some years ago, his brother Samuel carrying on the business under the old name until his death, which took place on the 21st of March, 1868 ; that the prisoner was the son of the said Samuel Firth, and, though not a partner, was employed by his father, and took an active part in the management of the business.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Thomas Hanson Schofield, the sub-manager of the gas works, stated that he went to Lily-lane Mill on the 27th of February, 1868. There were two meters in the mill, which witness filled with water, and turned off the taps, so that no gas could pass through either of them. He then went to the north-east corner of the mill outside and bored to the main, and there found a junction of a lead pipe with the main. Witness then went to the firing-up place to which he had traced the pipe, and to several other rooms in the mill, when he lighted the gas, which burnt freely. In all, witness lighted eighty-two jets, none of the gas supplying which passed through either of the meters, but through the pipe above-mentioned as inserted in the main at the north-east corner of the mill, but this pipe would not supply eighty-two jets burning at the same time. It would supply at nine-tenths, or day pressure, about twenty lights, and at twenty-five-tenths, or night pressure, about thirty bats'-wing lights; each burning about 5ft. an hour they would together consume about 100ft. per hour.

William Jagger, formerly engine-tenter at Lily-lane Mill, had charge of the engine and boiler there, between ten and eleven years. He left Firth's service on the 1st of August, 1867. There were gas-lights in the boiler and engine house when he went to Lily-lane Mill—one in the boiler house and three in the engine house. After he had been there some time they had other two lights in the engine house, which were fancy brackets, and also one more light in the crank hole, one in the cistern place, also two more on the top of the boiler. When witness had been at the mill some three or four years gas ceased to come, upon which he made complaint either to Mr. Samuel Firth or the prisoner, but cannot say which; and in consequence of the orders given him by the person to whom he made complaint, witness and another man dug up the earth, from where the junction pipe with the main at the north-east corner above-mentioned commences, to underneath the engine-house steps. They found a pipe buried in the earth, and there were holes in it and water. They took up the pipe the whole length, and plugged the hole in the main, replaced the pipes that were good, and where the pipes were bad they put fresh ones in their stead. Both Samuel Firth and the prisoner were present when they were doing the work, and saw them do it. It was about three years after witness had entered the Firths' service. The last time witness did anything to the pipe was about two years ago, when prisoner ordered witness to take up the junction pipe in order to get the water out. Witness took the water out of the pipe more than once, but he could not tell by whose orders. The lights in the engine house and boiler house burned until witness left, except when the water was in the pipe. Witness remembers the combing machine being put up about April, 1866. George Watson was employed in fitting-up the gas for it. Prisoner told witness that if he, prisoner, was not there by nine in the morning, he was to tell

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George Watson, the plumber, that he was to couple the pipes required for the combing machine to the pipe at the back side of the boiler house that supplied witness. Witness told Watson what prisoner had ordered him to say, and Watson did as he was ordered. After this the combing machine was supplied with gas, and continued so until witness left. The gas in the mill was shut off at six o'clock at night, when the hands left off. Thomas Lee shut it off. The custom was for the spinners each to turn off his own light, and Lee turned it off at the meter. Witness could always light his burner without turning any tap except the one at the burner; he had not to go to any meter. He had many times been in the combing-room in the middle of the day, and had seen the gas jets burning.

Simeon Ashworth stated that he was employed to superintend the putting-up of the combing machine at Lily-lane Mill in April, 1866, and remained there eight or nine months. Gas was burnt daily all the time witness was there, when the machine was running. It was lighted all day long.

Thomas Malkin stated that he went to Lily-lane Mill in the spring of 1866, that gas was constantly burning during the day in the combing room, and that he sometimes lit the gas. On cross-examination, witness said that the Firths were then working on short time.

At the close of the case for the prosecution, it was objected by the prisoner's counsel that, if the taking of the gas under the circumstances stated amounted to larceny, the case for the prosecution proved separate and distinct acts of larceny committed almost daily during a period of several years. That the prisoner could not be called on to answer such a case on one indictment, and that the prosecution must confine their evidence to, and the case go to the jury on one or on any number of separate takings of the gas not exceeding three, by or under the orders of the prisoner, within a period of six calendar months from the first to the last of such takings.

I overruled the objection, but reserved the point for the Court of Criminal Appeal, and after evidence had been given on behalf of the prisoner, the case was left to the jury, and the prisoner was convicted and liberated on bail.

The opinion of the Court is requested whether the conviction, under the circumstances above stated, is according to law.

J. G. SMYTH, Chairman.

The following sections of the Larceny Act (24 & 25 Vict. c. 96) were referred to in the course of the argument.

Sect. 5 enacts:—"It shall be lawful to insert several counts in the same indictment, against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them."

Sect. 6 enacts :—" If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings ; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appears to have taken place within the period of six months from the first to the last of such takings."

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*Manisty*, Q.C. (Serjt. *Tindal Atkinson* and *Forbes* with him), for the prisoner.—The conviction cannot be sustained. Upon the facts, each day's taking of the gas was a distinct act of larceny. The gas in the mill was turned off every night, and turned on every morning. [Pigott, B.—The stealing of the gas does not consist in turning on the gas in the mill, but in laying the secret junction pipe underground on to the main.] Under sect. 6 of 24 & 25 Vict. c. 96, the prosecution was bound to elect to proceed for such number of takings, not exceeding three, as appeared to have taken place within six months from the first to the last of such takings. [Byles, J.—The entire evidence was admissible to show the felonious intent. Lush, J.—If the prosecution had elected to proceed for the stealing on any given day, it would not shut out one iota of the evidence.] The prosecutors must specify the three larcenies on which they elect to proceed in order that the prisoner may not be tried a second time for them. Here the act was not continuous, the gas was turned off at nights and on Sundays. They were distinct takings day by day. [Channell, B.—If a man went to the cellars at Heidelberg, and from the large vat, which is continually filling, he drew out wine by a plug, and left it running, would not that be one continuous act of taking ?] Different managers of the mill may have been the persons who took the gas at different times. [Bovill, C.J.—There was always some gas in the secret junction pipe. There was always stealing therefore from the main.] That is confounding the means of stealing with the stealing. Besides, the gas is made from day to day ; and how could there be a continuous stealing for years of a thing not in existence all the time ? [Bovill, C. J. referred to *Reg. v. Bleasdale* (2 Car. & K.). The 24 & 25 Vict. c. 96, s. 6, was not then in existence.]

*Maule*, Q.C. (*Hannay* with him), for the prosecution.—The conviction was right. The indictment charges the prisoner with stealing 1000ft. of gas, and in order to show the guilty intent it was competent to the prosecution to show acts done by the prisoner of a kindred nature preceding or succeeding the specific act charged, and therefore the whole of the evidence was admissible for that purpose. If the evidence showed one continuous act of stealing on the part of the prisoner he cannot be indicted again. The secret pipe was fastened on the main, and there was nothing

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to prevent gas continually flowing into it. There was always gas in that pipe which was in the prisoner's possession. As to the fact that the gas was made from day to day, it might as well be said that the constant taking of water by a pipe from a reservoir is not one act of taking, because the reservoir is supplied by a river into which rain is daily falling. It is impossible to say where to draw the line, if such reasoning is to prevail. In *Reg. v. Ellis* (6 B. & C. 155), it was held that where several felonies are so connected together as to form part of one entire transaction, evidence of all may be given to prove a party guilty of one.

BOVILL, C. J.—We are all of opinion that the conviction is right and should be affirmed. If the objection were to be strictly considered as it is stated in the case, viz., “that the case for the prosecution proved a separate and distinct act of larceny committed almost daily for several years, and that the prisoner could not be called on to answer such a case on one indictment, and that the prosecution must confine their evidence to, and the case go to the jury on one or any number of separate takings of the gas not exceeding three, within a period of six calendar months from the first to the last of such takings;” and if the prisoner's case had rested on that ground, it is manifest that the objection was wrong, and that the prosecution was not bound to confine the evidence in support of it to those limits; but after the statement of Mr. Serjeant Atkinson the Court will deal with it as if the objection had been that the prosecution was bound to elect to proceed for such number of takings, not exceeding three, as should appear to have taken place within the period of six months from the first to the last of such takings. So looking at, it the first question that arises is, whether the evidence proved a series of acts of larceny during the several years the pipe was open and used, or one continuous act of larceny? Before the 14 & 15 Vict. c. 100, s. 16, repealed and re-enacted in 24 & 25 Vict. c. 96, s. 5, there must have been a separate indictment for each distinct act of larceny, but that section enables the prosecution to insert several counts in the same indictment against the same person, for any number of distinct acts of stealing not exceeding three which may have been committed within the space of six months, from the first to the last of such acts, and to proceed thereon for all or any of them. The same rule of construction as before the statute must govern the question whether the evidence shows separate and distinct acts of larceny, or one continuous act of larceny. Before sect. 6 can apply to a case, it must be established that the takings were at different times, and so distinct that the Court could calculate that the three relied on were within the period of six months from the first to the last of the three. If there was anything like a continuous taking, the whole of the evidence was given; and it was treated as one act of stealing, as in *Reg. v. Bleasdale*. The statute does not alter the application of the law with regard to the nature of the act of larceny. In *Reg. v. Bleasdale* the prisoner, the lessee of a coal



mine, was indicted for stealing coal from the mine of H. J. Gunning. It appeared that the prisoner had from the shaft opened to work his mine carried on extensive workings of coal by means of levels, drift ways, tunnels, cuttings, and drains, and thereby got coal belonging to about forty different proprietors without their sanction or knowledge, and had thus unlawfully possessed himself of 10,000*l.*'s worth of coal belonging to other persons. Upon these facts being stated, the prisoner's counsel objected that it was not competent for the prosecution to proceed under the indictment for felonies so distinct; that each separate severance and removal of coal was a separate and distinct felony. Erle, J., said: "The question is whether such a case as this is one entire transaction? It may be that the making a level, a tunnel, a drain, and a cutting may be all necessary in order to take particular coal; if so, all would, I think, be part of one transaction, and might properly be given in evidence. I cannot interfere at present." The evidence for the prosecution was then given. It extended to all the operations mentioned in the opening of the case—to the getting of coal continuously during more than four years, to the operations conducted by different under-lookers and by many different workmen and to coals taken from the coal fields of thirty or forty different owners. On the case for the prosecution being closed, the defendant's counsel asked that the prosecution might elect upon which charge he would go to the jury, but Erle, J., refused to direct the prosecution to elect, and said, "For convenience sake the prisoner's counsel might address himself to the stealing of the coal under the churchyard. The whole workings might be relied on to show the felonious intent, though they go into twenty different counties." In summing up, Erle, J., said: "The remarkable part of this case is the extent of the property taken; and it has been urged that the taking of each day was a separate felony, and that only one felony could be inquired into on this indictment. I should say as long as coal was gotten from one shaft it was one continuous taking, though the working was carried on by means of different levels and cuttings and into the lands of different people. As however complaint was made by counsel for the prisoner, I have thought it better that your attention should be confined to the charge of taking the coal of one owner. But in order to show that when the prisoner took the coal of Mr. Gunning in No. 10 drift he knew he was out of his boundary, I have permitted it to be proved that he has gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal." That case, therefore, is very like the present. If the taking of the coal in that case was one continuous act of larceny, looking at the present case in the most favourable light for the prisoner, it was a continuous act of stealing gas. Then there was the case of *Reg. v. Shepherd* (11 Cox Crim. Cas. 119), decided in this Court a short time ago, where the prisoner was convicted of cutting with intent to

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steal trees to an amount exceeding the sum of 5*l.* The chairman of the Court before whom the prisoner was tried directed the jury that in order to convict they must be satisfied that he cut down at one time, or so continuously as to form one transaction, such a number of the trees as would make the injury done amount to a sum exceeding 5*l.*, and that ruling was confirmed by this Court. That is another instance in which there was one continuous act of larceny, though in one sense there were several takings. In the present case it was contended there was only a taking from time to time when the gas was turned on; but the fact was that there was a pipe to the main which was always open and contained gas, and there was no period when it was closed. It is impossible not to say as to that, that it was one continuous act. This case has been illustrated by instances put in the argument of a man going to a granary with waggons, and filling them with corn from time to time as opportunity offered; and of a man being in a house and taking something from each room in the house. In all these cases there would be one continuous taking. We are therefore of opinion, both on the authorities and on the facts, that this was one continuous act of stealing, and that the conviction was right. The object, motive, and intention of the prisoner may always be looked at, and there was nothing to prevent the case being presented to the jury in the way in which it was.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 23, 1869.*

(Before BOVILL, C.J., CHANNELL, B., BYLES, J., PICOTT, B., and LUSH, J.)

REG. v. WILLIAM TYRIE.(a)

*Embezzlement—Friendly Society—Treasurer.*

*The treasurer of a friendly society, formed under 18 & 19 Vict. c. 63, into whose hands the moneys received on behalf of the society were to be paid, and who was to pay no money except by an order signed by the secretary and countersigned by the chairman, or a trustee, and who by the statute was bound to render an account to the trustees and to pay over the balance on such accounting when required, is not a clerk or servant, and cannot be indicted for embezzlement of such balance.*

CASE reserved for the opinion of the Court of Criminal Appeal.

William Tyrie was tried before me at the Sessions of the Peace for Middlesex, on the 6th of January, 1869, on an indictment which charged that he was employed in the capacity of a clerk and servant to Samuel Young and others, and whilst so employed did receive and take into his possession a sum of money, to wit, 186l. 5s., for and in the name and on account of the said Samuel Young and others; and that he, the said William Tyrie, feloniously did embezzle the said money, being the money of the said William Young and others his said masters, contrary to the statute, &c.

The prisoner was prosecuted at the instance of the trustees of a society called the Weymouth Lodge Friends of Labour Loan Society, which had been duly enrolled, and the rules of which had been duly certified by the barrister appointed to certify the rules of savings banks.

The prisoner had for two years filled the office of treasurer, and by one of the society's rules the duties of that office were defined as follows:—"That a treasurer shall be appointed into whose hands all money received on meeting nights, as

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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well as all other money received for or on behalf of this society, shall be paid, and for which he shall sign a proper receipt. He shall be responsible for all money paid to him by the cashier or any other person for or on behalf of this society; he shall pay no money for or on behalf of this society except by an order signed by the secretary and countersigned by the chairman or a trustee; he shall give proper securities for the faithful execution of such office or trust pursuant to the 3 & 4 Vict. c. 110, s. 12, in a bond of 100l."

According to another rule all moneys of the society were vested in trustees, of whom it was proved that Samuel Young was one.

The prisoner was a member of the society, but received no salary or payment as treasurer, nor were there any fixed periods for his accounting for the moneys received and paid by him.

In June, 1868, the prisoner was called upon by the trustees of the society to produce his accounts, and they were examined by auditors, one of whom was appointed by the prisoner; and on such examination it appeared that during his office the prisoner had received on account of the society sums amounting to 10,638l., and that he had disbursed 10,458l., leaving to be accounted for the sum of 180l. or thereabouts. On being required to pay over this sum he disputed the accuracy of the demand, and stated that his deficiency did not amount to more than 126l. As, however, he did not make any payment whatever the present charge was preferred.

I doubted whether the prisoner could be considered as a clerk or servant, or to have acted in the capacity of clerk or servant, so as to make him amenable for the crime of embezzlement; but my attention having been called to the case of *Reg. v. Murphy* (4 Cox Crim. Cas. 101), I reserved that question and took the opinion of the jury upon the facts, directing them to find a verdict of guilty if they were satisfied that the prisoner had failed to pay over the money received by him on account of the society, and had knowingly applied such money to his own purposes.

The jury found the prisoner guilty, and judgment was respited until a decision of the question reserved was obtained, the prisoner being in the meantime allowed to be at large on bail. Not having entered into the requisite recognisances the prisoner has remained in custody, and is now confined in the House of Correction for the county of Middlesex.

The question I have to submit to this honourable Court is whether the prisoner was a clerk or servant, or acting in the capacity of a clerk or servant to the trustees of the society, so as to make him, by his misappropriation of the money received by him as treasurer, liable to be convicted of the crime of embezzlement.

If this question be answered in the affirmative, the conviction is to stand; if in the negative, the conviction is to be quashed.

WM. H. BODKIN, Assistant-Judge.

*Ribton*, for the prisoner.—The conviction cannot be sustained. The prisoner was not employed in the capacity of a clerk or servant to the trustees of the society within the meaning of the 24 & 25 Vict. c. 96, s. 68. The rules of the society do not show, and it did not appear at the trial, how the prisoner was appointed treasurer. He had no salary, and was no more than a gratuitous bailee of the money paid into his hands. The 24 & 25 Vict. c. 96, s. 68, contemplates the case of clerks or servants paid for their services. [BOVILL, C.J.—That cannot be the test. How many young men go into mercantile situations without pay in the first instance?] In *Reg. v. Murphy* the prisoner was a paid secretary, for it is said in the case “that he took credit for different sums against the moneys that came to his hands as payments to himself as secretary to the society, and which could only be understood as payments to the prisoner as a remuneration for his trouble as an officer of the society.” There is no decision that establishes that the treasurer of a friendly society is the servant of the trustees. The trustees had no control over the prisoner at all; he owed no duty to them; and he made the payments on cheques signed by the secretary and countersigned by the chairman. The prisoner was nothing more than the banker of the society. There was no fixed time for the prisoner accounting. [BOVILL, C.J.—Is there any fact that distinguishes the prisoner’s case from that of a banker in a country town, who is frequently appointed the treasurer of a similar society?] Nothing. He did what he liked with the money he received, and might pay it into his own private banking account. [BOVILL, C.J.—He seems to be like a county treasurer, who cannot be said to be the clerk or servant of the Justices.]

*Metcalf*, for the prosecution.—The rules of the society are to be construed in relation to the Friendly Societies Act (18 & 19 Vict. c. 63). By sect. 18 of that statute all the real and personal estate of the society is vested in the trustees for the time being; and in all actions or suits or indictments or summary proceedings before magistrates touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee in his or their proper name or names as trustee or trustees of such society, without any further description. And by sect. 19, the trustees are authorised to bring or defend any action, suit, or proceeding in any court of law or equity touching or concerning the property of the society. By sect. 21, the treasurer, before he takes upon himself the execution of his office, is to enter into a bond or give a guarantee for the just and faithful execution of his office, and for rendering a just and true account of all moneys received and paid by him on account of the said society at such times as the rules shall direct, and at such times as he shall be required so to do by the trustees or committee or the members; and every such bond shall be given to the trustees for the time being, &c. And then, by sect. 22, the treasurer is to render a

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## COURT OF CRIMINAL APPEAL.

*January 30, 1869.*

(Before BOVILL, C.J., CHANNELL, B., BYLES, J., PIGOTT, B., and LUSH, J.)

REG. v. WILLIAM HIBBERT. (a)

*Abduction—Taking girl out of father's possession—24 & 25 Vict. c. 100, s. 55.*

*The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her, and detained her for some hours. He then took her back to where he met her and she returned home to her father :*

*Held—in the absence of any evidence that the prisoner knew, or had reason for knowing, or that he believed, that the girl was under the care of her father at the time—that a conviction under the 24 & 25 Vict. c. 100, s. 55, could not be sustained.*

CASE reserved for the opinion of this Court by Mr. Justice Lush.

The prisoner was tried before me at the last Assizes at Manchester for having “unlawfully taken Elizabeth Ann Oldham, an unmarried girl under the age of sixteen, out of the possession and against the will of her father : (24 & 25 Vict. c. 100, s. 55).

The girl, who lived with her father and mother at Ashton, left her home in company with another girl to go to a Sunday School. The prisoner met the two girls in the street, and, after some little persuasion, induced them to go with him to Manchester, on the pretence of showing them some object of curiosity there. He paid their railway fare there and back.

At Manchester he took them to a public-house, and there seduced the girl in question. He then accompanied them back to Ashton, and parted from them in the street where he had met them. The girl immediately went home, having been absent some hours longer than she ought to and otherwise would have been.

The prisoner made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to and did not believe that she was a girl of the town.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



The jury found him guilty, but, in deference to *Reg. v. Green* (3 F. & F. 274 ; 1 Russ. on Crimes, by Greaves, 958), I reserved the question whether the case is within the statute, and suspended the sentence.

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No counsel appeared on either side.

BOVILL, C. J.—This is a case of great importance, and it depends on the true construction of the 24 & 25 Vict. c. 100, s. 55, which enacts that “whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor.” In the present case there is no statement or finding as a matter of fact that the prisoner knew, or had reason to know or to believe, that the girl was under the care of her father or mother; certainly no statement or finding that he knew she was under the care of her father as charged in the indictment. In cases where a man has gone with a girl of the town, the circumstances may rebut the inference of such knowledge, but there may be other cases where from circumstances such knowledge may be shown to exist. In this case, however, in the absence of any finding that the prisoner knew that the girl was under her father’s care, we are of opinion that the conviction cannot be sustained. Our decision is in accordance with that of Martin, B., in *Reg. v. Green and Bates*. In that case the girl was under fourteen years of age and lived with her father. The prisoners saw her in a street near where her father lived, and induced her to go with them to a lonely house which was under repair, where one of them had intercourse with her and kept her out all night. On the next morning she was found there crying, and the charge was preferred. At the trial Mr. Baron Martin said: “There must be a taking out of the possession of the father. Here the prisoners picked up the girl in the streets, and for anything that appeared they might not have known that the girl had a father. The essence of the offence was the taking the girl out of the possession of her father. The girl was not taken out of the possession of any one. The prisoners no doubt had done a very immoral act, but the question was whether they had committed an illegal act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offence. He had told the grand jury so, and advised them to throw out the bill. He should direct the jury to acquit the prisoners.” Under the present circumstances we are of opinion that this conviction must be quashed.

PICOTT, B., said that after much doubt and hesitation he concurred.

LUSH, J.—At the trial my opinion was the other way, but upon further consideration I am satisfied that the decision at which the Court has arrived is right.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

April 24, 1869.

(Before KELLY, C.B., BYLES and LUSH, JJ., CLEASBY, B., and  
BRETT, J.)

REG. v. JENKINS. (a)

*Evidence—Dying declaration—Admissibility.*

*The magistrates' clerk administered an oath to a dying person and she made a statement. He asked her if she felt she was likely to die? She said, "I think so." He said, "Why?" She replied, "From the shortness of my breath." He said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None." He then proceeded to write out the deposition, and when finished read it to her, and asked her to correct any mistake that he might have made. She said, "No hope, at present, of my recovery," and he then inserted those words: Held, that the declaration was inadmissible, as the words "at present" introduced by the deceased were a qualification of her previous statement that she had no hope of recovery.*

CASE reserved for the opinion of this Court by Mr. Justice Byles.

The prisoner, Henry Jenkins, was convicted at the last Bristol Assizes of the murder of Fanny Reeves, and is now lying under sentence of death, subject to the decision of the Court of Criminal Appeal as to the admissibility of the dying declaration of the deceased woman.

It appeared in evidence that on the night of the 16th of October, between eight and nine o'clock, the screams of a woman were heard in the river Avon at a place where the river is deep. It was about high tide. Assistance was procured, and the deceased was rescued from the water, but in an exhausted condition. She continued very ill, and became, according to the medical evidence, in great danger. On the next day (the 17th) she said she did not think she should get over it, and desired that some one should be

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

sent for to pray with her. A neighbour of the name of Axell accordingly visited her about eight o'clock p.m., prayed with her, and, as her mother said, talked seriously to her.

At ten o'clock the same evening the magistrates' clerk came. He found her in bed breathing with considerable difficulty, and moaning occasionally. He administered an oath, and she made her statement as hereinafter set forth. He asked her, "If she felt she was in a dangerous state; whether she felt she was likely to die?" She said, "I think so." He said, "Why?" She replied, "From the shortness of my breath." Her breath was extremely short; the answers were disjointed from its shortness. Some intervals elapsed between her answers. The magistrates' clerk said, "Is it with the fear of death before you, that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None."

The counsel for the defendant pointed out that in the statement the words "at present" are interlined.

The magistrates' clerk was recalled. He said that after he had taken the deposition he read it over to her, and asked her to correct any mistake that he might have made. She then suggested the words "at present." She said no hope "at present" of my recovery. He then interlined the words "at present." She died about eleven o'clock the next morning.

Without the declaration of the deceased, there was no evidence sufficient to convict, or even to leave to the jury; but the evidence for the prosecution was, so far as it went, confirmatory of the deceased woman's statement.

The case, therefore, rested on what was called the dying declaration of the deceased.

The counsel for the defendant, Mr. Collins, submitted that upon the evidence there was not such an impression of impending death on the mind of deceased as to render the declaration admissible.

I expressed no opinion; but thought it the safest course to reserve this question for the opinion of this Court, and to let the case go to the jury.

The examination of Fanny Reeves, taken on oath the 17th of October, 1868. The deponent saith:—

"I am a single woman and have two children, the one aged four years and the other aged about five months. The father of the first child, which is a boy, is Henry Jenkins. He lives in Ship-lane, Cathay, and is a ship carpenter. He has been paying me, under order of magistrates, 2s. per week for the support of that child, but he has not kept up the payments, and he now owes me 1l. 7s. Last night, the 16th inst., about half-past six o'clock, I met him by appointment on the New Cut, in the parish of Bedminster, in this city, and I asked him if he was going to give me some money to buy a pair of boots for myself. He said that he hadn't any money. I told him that I must sue him for my money, and then he asked me to walk with him to the Hot Wells and said that he would get some there. I accompanied him to

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the Hot Wells, and he went into a house at Cumberland-terrace. I waited for him outside, and he came out in a short time and said he couldn't get any money, and he asked me then to walk with him up Cumberland-road, and we went along that road together until we got near Bedminster Bridge, and we stood on the New Cut near his residence, and we had a few angry words together about the money he owed me, and he told me I could have a warrant for him if I liked. After we had stood there about ten minutes he said, 'Here's a rat climbing up the bank,' and he advanced to the edge of the bank, and I went too and looked, but could not see any rat, and directly I got on the edge of the bank he pushed me with both hands on the back, and at the same time said, 'Take that, you bugger,' and he pushed me direct into the river Avon which runs along there. I screamed out and managed, by catching hold of the bank, to keep myself up until I was taken out of the water, and I believe it was by a policeman. After being so taken out I became insensible, and did not recover till I found myself in bed in this house. Since then I have felt great pain in my chest, bosom, and back. From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope at present of my recovery. Dr. Smart has been to see me twice to-day. It was about eight o'clock on the said evening when the said Henry Jenkins pushed me into the water. He was under the influence of liquor at the time, but was not tipsy. I had two drops of rum with him during our walk. I know of no motive for his so pushing me into the water, except it was that I had asked him for money."

The mark (X) of Fanny Reeves.

The jury found the prisoner guilty.

Sentence of death was passed, but execution stayed that the opinion of this Court might be taken on the admissibility of the declaration.

J. BARNARD BYLES.

*Collins* (Norris with him), for the prisoner.—The declaration of the deceased was inadmissible. The principle on which dying declarations are admitted in evidence was thus stated by Eyre, C. J., in *Rex v. Woodcock* (1 Leach C. C. 502): "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone—when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath, administered in a court of justice." The declaration must be made under fear of impending death, and almost immediate dissolution. In *Rex v. Van Butchell* (3 Car. & P. 629), it was proposed to give in evidence the following declaration of a deceased person made on the day (May 10) when the injury was inflicted: "I feel that I have had such an injury in the bowel that I think I shall

never recover;" and, although the surgeon endeavoured to encourage him, the deceased said that he felt satisfied he should never recover. The deceased died on the 17th. Hullock, B., rejected it, saying, "The principle on which declarations *in articulo mortis* are admitted in evidence is that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately never recover; but still that would not be sufficient to dispense with an oath." So in *Rex v. Crockett* (4 Car. & P. 545), a declaration of the deceased was tendered in evidence. The deceased was told by the doctor that she would not recover, and was quite aware of her danger. She said, "She hoped I would do what I could for her for the sake of her family." The doctor told her there was no chance of her recovery. Bosanquet, J., said: "This showed a degree of hope in her mind, and, to render a declaration of this kind admissible, the deceased must have had the impression on her mind of an almost immediate dissolution." Again, the declaration should be made at the time when the deceased had an absolute conviction of impending death. In *Reg. v. Dalmas* (1 Cox Crim. Cas. 95), the deceased's throat had been cut by a razor. One of the witnesses, on seeing the deceased, exclaimed, "My God, the woman will bleed to death before assistance comes!" The deceased heard that. The witness said, "She is dying." She heard that also. She was lying on her back, bleeding profusely. A policeman whispered something in her ear. She lived about five minutes afterwards. She appeared to him to be sensible. The witness admitted that he might have said, "If you do not send for assistance she will bleed to death." It appeared by the depositions that the policeman had asked the deceased, "Was Dalmas the man who did it?" to which she replied, "Yes." Gurney, B. (after consulting Williams, J.), said: "We are of opinion that this question is too doubtful a one to justify us in answering it in the affirmative. There must not only be actual nearness of death, but an absolute conviction of it in the mind of the individual. We believe that no case has gone the length of saying that the latter can be dispensed with. The decision on points of this kind must always rest upon the circumstances of each individual case; but here there is nothing but a mere inference that the deceased was probably aware she could not recover." In *Reg. v. Peel* (2 Fos. & Fin. 21), the marginal note of which is, that a dying declaration is admissible if the declarant conceives himself to be past recovery, although the surgeon attending him may believe him to be progressing favourably, Willies, J., said: "It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall, therefore, admit the declaration." In *Rex v. Hayward* (6 C. & P. 160), where the question arose whether the declarations of the deceased were admissible in evidence, as to which the facts were, that after the surgeon had examined the wound, the

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deceased inquired if he was in danger, the surgeon answered that he was, and that the only chance of his living was keeping himself quite quiet, upon which it was contended that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements; and that he must be taken to have some hope of recovery. On which Tindal, C. J., observed, that "Any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made would undoubtedly render the evidence of such declarations inadmissible." And in *Reg. v. Spilsbury* (7 C. & P. 187), where it was proposed to give a dying declaration in evidence, Coleridge, J., said: "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that if received it would have the greatest weight with the jury, I think I ought not to receive the evidence unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence of the witness Redfern that the deceased said that he thought he should not recover, as he was very ill. Now people often make use of expressions of that kind who have no conviction that their death is near approaching. If the deceased had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow importing that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed that he was convinced that his death was at hand. As nothing of this sort appears, I think that there is not sufficient proof that he was without any hope of recovery, and that I ought to reject this evidence." In *Reg. v. Nicolas* (6 Cox Crim. Cas. 120), it appeared that the deceased made a statement, and at the conclusion of it exclaimed, "Oh, God! I am going fast; I am too far gone to say any more." The statement was held inadmissible by Cresswell, J. (after consulting Williams, J.), who said: "My brother Williams confirms the doubts I had on this subject—that it being possible that this man did not discover the extent of his weakness till he had made the statement, and that it was only after he made it he for the first time discovered that he was going fast, there is not that clear ascertainment of his consciousness of his state before he made it to render it admissible in evidence." So in *Reg. v. Megson* (9 Car. & P. 418), the surgeon told the dying person that she was in a very precarious state, and on the day before her death she was much worse, and in his judgment in imminent danger; she then made a statement to him, and immediately before she made the statement she said that she found herself growing worse, and that she had been in



hopes she should have got better, but as she was getting worse she thought it her duty to mention what had taken place. She died next day. Rolfe, B., said: "I think that it does not sufficiently appear that the deceased was without hope of recovery. I think that I ought not to receive the evidence." Applying these decisions to the facts in this case: On the night of the 16th of October the deceased was rescued from the river; on the next day she said to her mother she did not think she should ever get over it. [CLEASBY, B.—And desired that some one should be sent for to pray with her.] The word "ever" implies that she had some ray of hope in her mind, and that she was not in a hopeless condition as to her life. Then again her correction of the magistrates' clerk by directing him to insert the words "at present" also imports that she had not lost all hope. It is, therefore, submitted that the statement of the deceased was inadmissible, and that the conviction should be quashed.

*T. W. Saunders* (*F. Bailey* with him), in support of the conviction.—The statement was admissible, and the conviction should be affirmed. All the conditions exist requisite to make the statement admissible. It was made under the belief that she was dying, and with the fear of death before her. With the exception of the words "at present," this case is as strong as any in the books in which dying declarations have been held admissible. [LUSH, J.—It is clear that the words "at present" do not strengthen her impression of impending death, but do they not weaken it?] The deceased by the words "at present" may have meant only to call the magistrates' clerk's attention to the fact that his question was "have you any *present* hope." It is submitted, taking the whole of the circumstances together, the declaration was made while the deceased was under the impression of impending death.

*Collins*, in reply, cited the following passage from Greenleaf on Evidence, 233: "Though these declarations, when deliberately made under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination—a power quite as essential to the eliciting of all the truth as the obligation of an oath can be; and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn; and it is further to be considered, that the particulars of the violence to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons and to the omission

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of facts essentially important to the completeness and truth of the narrative.”

KELLY, C. B.—We are all of opinion that this conviction should be quashed. The only question in the case is, whether the declaration of the dying woman was admissible in evidence, because it is clear that if that ought to have been excluded there was no evidence that would justify the conviction. The answer to this question depends on what passed between the clerk to the magistrates and the dying woman at the time when she made the declaration. The case states that the magistrates’ clerk came and found her in bed, breathing with considerable difficulty and moaning occasionally. He administered an oath and asked her if she felt she was in a dangerous state; whether she felt she was likely to die. She said she thought so. As far as that goes, it would indicate that something was passing in her mind as to her condition, but nothing that amounts to an impression that she was then likely to die. It is not conclusive as to her consciousness of her condition. He then asked her, “Why?” She said, “From the shortness of my breath.” The magistrates’ clerk then said, “Is it with the fear of death before you that you make these statements?” and added, “Have you any present hope of your recovery?” She said, “None.” He then proceeded to reduce her statement to writing. If she had subscribed that statement, it would have presented a very different case for our consideration; but it appears that after he had taken the deposition he read it over to her, and asked her to correct any mistake that he might have made. She then suggested the words “at present.” She said no hope “at present” of my recovery. He then interlines the words “at present.” The question is, whether on these facts the declaration was admissible as it stands. I am of opinion that the fair result of the authorities is that the declaration of a dying person in order to be admissible in evidence must be made under a belief, and a belief without hope, that the declarant is about to die. From the decisions and the express language of the Judges we find that one Judge has said that the declaration must be made when every hope of this world is gone; another has said there must be a settled hopeless expectation of death; and a third has said that any hope of recovery, however slight, will exclude the declaration. Furthermore, it is a principle of the law of evidence that the burden of proof as to the state of mind of the declarant is on the prosecution, says another learned Judge; and we must be perfectly satisfied beyond a reasonable doubt that the declaration in question was made by the deceased while under the belief that there was no hope of recovery. To apply these principles to the present case the prosecution calls on us to give no effect whatever to the important words “at present.” The dying woman must have had some meaning when she used them. We are to see what her meaning was. On the one hand, it is possible that she may have remembered that the magistrates’ clerk put this question to her, “Have you any present hope of recovery?” And

she may have intended to answer that question in form ; but, on the other hand, she may have desired to alter or qualify her answer, and may have meant to say, not that she had absolutely no hope of recovery, but no hope of recovery at present. If we had only to determine between these two constructions we should be bound to give our decision *in favorem vitæ* for the latter construction ; but the case presents a mode of solution which calls on us to interpret the construction in favour of the prisoner. After the deposition had been read over to her, she was asked in express terms to correct any mistake that the clerk might have made in it. She then said, "No hope at present." Now what is that but saying there is a mistake, and she desired the clerk to put in those words ? If so, that is a qualification of the words "no hope," and the woman was not in that hopeless state of impending death that was necessary to render her declaration admissible in evidence. The declaration, therefore, ought not to have been received, and the conviction must be quashed.

BYLES, J.—As I tried the case, I may say that I entertained from the first a very strong doubt whether the declaration was admissible in evidence ; but, there being no other evidence to convict the prisoner, I thought it my duty to admit it and reserve the point. We should guard with jealousy the admissibility of such declarations, the admissibility of which is an exception to the ordinary rules of evidence ; for they may be made without the sanction of an oath, and when the party is in no fear or danger of the penalties of perjury, and when the persons making them are very liable to the influences of misrepresentation or error. The result of the authorities seems to be that the dying person must be under the impression that his or her death is almost immediately impending. Now, in the present case the correction of the deceased amounts to this, "That's not what I said or what I meant ; not that I had no hope, but no hope at present." If so, the declaration was improperly admitted in evidence, and the conviction must be quashed.

LUSH, J., CLEASBY, B., and BRETT, J., concurred.

*Conviction quashed.*

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v.  
JENKINS.  
—  
1869.  
—  
*Evidence—  
Dying  
declaration.*

## COURT OF CRIMINAL APPEAL.

*April 24, 1869.*(Before KELLY, C.B., BYLES and LUSH, JJ., CLEASBY, B., and  
BRETT, J.)

REG. v. BURROWS.(a)

*False pretences—Evidence.*

*On an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public-house, and that the prisoner, pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief:*

*Held, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, a conviction could not be sustained.*

CASE reserved for the opinion of this Court by Mr. Baron Bramwell.

This was an indictment for obtaining goods by false pretences. It was tried before me at the last Assizes for Hertfordshire. The evidence was as follows:—

Eliza Osborn (wife of William Osborn).—On Friday, Feb. 12, I went to Tring market. Met prisoner at five minutes past nine. She came and asked price of plait. I said, "Fourteen pence." She said, "Thirteen pence." I said, "No; it was very good work." She asked how many scores there were. I said, "Thirty." She said, "I will have it." I said, "Let me bring it in; I will keep it dry." She said, "No; I will bring it in." That means, bring it in, as I supposed, to the Rose and Crown. I asked for a ticket. She said, "That did not matter." I said, "Then where do you pay?" She said, "In the Rose and Crown tap-room; there she would pay me." She took it then; I let her have it. Our general way of speaking to the buyers is to say, "Where do you pay?" We have to go to a public house to be paid. I

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

parted with it on belief she would pay me. I did not know her as a plait dealer. I thought she was a plait dealer, because she bid for it, and told me where she would pay for it. Several buyers pay there. I went to the Rose and Crown. They begin to pay about half-past nine. I might have believed her if she had said she would pay at half-past nine in the market place. I did not find her. Other dealers were there.

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—  
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—*Evidence.*

Cross-examined: I have attended Tring market thirty years. She took it after I asked where she paid, and after she told me. I believed she would pay me, and so parted with it. There are many public houses where they pay. They pay at some private houses. I went to the Rose and Crown in a quarter of an hour.

Tamar Crockett (wife of George Crockett, Tring).—She asked what I wanted for plait. I said, "Tenpence halfpenny." She said, "Tenpence." She took it. I said, "Where do you pay, good woman?" She said, "At the Blooming Feathers." I said, "I don't know that." She said, "I'll pay at the Rose and Crown tap-room." She took it off my hand. It is a common rule for many plait buyers to take it. I believed I should find an honest woman in the tap-room to pay. I did not find her there. She offered tenpence, then took the plait. Then we spoke about the Rose and Crown.

Cross-examined: When I asked her where she would pay she had got the plait.

How.—I saw the prisoner. She took plait, and asked what I wanted for it. I said, "Eightpence." She said, "Sevenpence." I asked her where she paid. She said, "At the Rose and Crown." I said, "Where are you paying, or where will you pay?" She said, "You'll be sure to find me." I believed she was an honest woman. I thought she took the room as well as others. I thought she had been there and taken a room to pay. That is the practice. We ask the buyers if we don't know them. I believed she had taken the room. They stop a penny out of the price, and we have beer: some do, and some do not, but pay the room themselves, and stop nothing.

To me: I parted with my plait, because I thought she was an honest woman, and had put up there.

Sarah Kidd (barmaid at the Rose and Crown).—It is the practice of plait buyers to have so much beer. They come and ask for the room. The beer is for the use of the room. The sellers come to receive. They don't pay for the room. Two front rooms were taken this day. Each buyer had a separate table. The prisoner had not taken a room, nor anything to justify her in saying she was going to pay there.

Cross-examined: If they did not have beer they would have to pay. I can swear I think she was not there. There was no strange plait buyer that day. The buyers pay for the beer. The prisoner was not in the room.

To me: We have regular customers. Have had no fresh ones for six years.

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*False pretences*  
—*Evidence.*

Robert Goodyear.—I took prisoner at Leighton that afternoon. I searched every house in Tring first. Could not find her. Leighton is a mile from Tring. I said, "Are you a plait buyer?" She said, "I buy a little sometimes for my neighbours." I said, "Have you bought any to-day?" She said, "No." I said, "Tell the truth; a woman has been to Tring market and got a lot of plait without paying; have you been to Tring market?" She said, "No." She turned to a person and said, "You know that." Upstairs in a back room I found plait. She afterwards said, "How much further have I to go?" She said, "I have been to Tring market and bought plait, and paid for it, but not for first two bundles."

*Oodd* (counsel for the prisoner) submitted there was no case.

The indictment was appropriate to the case proved.

I told the jury as follows:—If it is the practice for buyers to engage a room, or table in a room at public houses, of which the Rose and Crown is one, to pay sellers of plait; if that practice is well known; if what she, prisoner, said, naturally conveyed to sellers' minds that she had done so; if that was untrue; and if they, or any of them, parted with their goods in the belief she had done so, then they might find her guilty.

They found her guilty.

I have to request the opinion of the Court of Criminal Appeal whether there was evidence of the matters left to the jury as to any of the cases, and whether the direction was correct in point of law.

If the direction was correct as to any of the cases, and there was evidence to support it, the conviction as to such case is to stand, otherwise to be quashed.

The prisoner is on bail.

G. BRAMWELL.

*Oodd*, for the prisoner.—The conviction was wrong. All that the evidence amounted to is a breach of contract. The false pretence laid in the indictment was that the prisoner alleged that she had taken a room, but the evidence does not support a conviction on that ground; all that the case shows is, that she said she would pay for the room.

No counsel appeared for the prosecution.

KELLY, C. B.—It is consistent with all that is stated in the case that the prisoner may have gone into the market, not knowing whether she would make any purchases or not, and having made some purchases, that she then promised to pay for them at the Rose and Crown public house. At the time she made the promise she had not taken a room at the Rose and Crown, and there is no evidence that she knew there was a practice in the market to take a room for making such payments. It is quite consistent with the evidence that all she meant was that she would then take a room, and there pay for the purchases. That is not a false pretence, and the conviction must be quashed.

The rest of the Court concurred.

*Conviction quashed.*



## COURT OF CRIMINAL APPEAL.

*April 24, 1869.*

(Before KELLY, C.B., BYLES and LUSH, JJ., CLEASBY, B., and  
BRETT, J.)

REG. v. JOHN TAYLOR.<sup>(a)</sup>  
REG. v. CANWELL AND DUNN.

*Misdemeanor—Maliciously wounding—Inflicting grievous bodily  
harm—Common assault.*

*Upon an indictment under 24 & 25 Vict. c. 100, s. 20, for unlaw-  
fully and maliciously wounding or inflicting grievous bodily harm,  
a verdict for a common assault may be returned.*

REG. v. JOHN TAYLOR.

CASE reserved for the opinion of this Court.

The prisoner, John Taylor, was indicted at the Easter General Quarter Sessions, 1869, of the North Riding of Yorkshire, for a misdemeanor, upon an indictment, of which the following is a copy :

North Riding of Yorkshire, } The jurors for our Lady the Queen,  
to wit. } upon their oath, present, that John  
Taylor, on the 3rd of January, 1869, unlawfully and maliciously  
did wound one Thomas Meek.

And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid the said John Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas Meek.

Upon this indictment the jury returned a verdict of "Guilty of an assault."

The counsel for the prisoner contended that the prisoner could not be convicted of a common assault on that indictment, and therefore that the verdict amounted to an acquittal.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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v.  
JOHN TAYLOR.  
—  
1869.

*Maliciously  
wounding—  
Indictment—  
Verdict.*

The Court thereupon postponed judgment, and reserved the question of law for the consideration of the Justices of either Bench and Barons of the Exchequer, viz., Whether this conviction can be sustained?

In the mean time the prisoner was admitted to bail to appear at the next Court of Quarter Sessions of the North Riding of Yorkshire to receive judgment if called upon.

JOHN R. W. HILDYARD, Chairman.

*Shepherd*, for the prosecution.—This is an indictment for misdemeanor upon the 24 & 25 Vict. c. 100, s. 20, which enacts—“That whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person either with or without any weapon or instrument, shall be guilty of a misdemeanor;” and the question is whether a verdict of guilty of a common assault can be received upon such an indictment. In the case of *Reg. v. Oliver* (Bell C. C. 287; 8 Cox Crim. Cas. 384), it was held that upon an indictment for assaulting, beating, wounding, and occasioning actual bodily harm against the statute the prisoner might be convicted of a common assault. Although the indictment in the present case does not contain the word “assault,” yet the charges of wounding and inflicting grievous bodily harm necessarily include an assault. And in *Reg. v. Yeadon* (L. & C. 81; 9 Cox Crim. Cas. 91), upon an indictment containing counts for inflicting grievous bodily harm and unlawfully and maliciously cutting and stabbing and unlawfully occasioning actual bodily harm, it was held that a verdict of guilty of a common assault might have been returned. In *Reg. v. Ingram* (1 Salk. 384), it was held that there could not be a battery and wounding without an assault, although there might be an assault without the former. See also 1 Hawk. P. C. bk. 1, c. 62, s. 1. The entry on the record on an indictment like the present would be, “Guilty of a common assault.”

No counsel appeared for the prisoner.

KELLY, C.B.—We are all of opinion that this conviction should be affirmed. Although the word “assault” does not occur in either count of the indictment, yet both counts necessarily include an assault, and both are counts for misdemeanor, and, the prisoner having been found guilty of a common assault, we are of opinion that the conviction should be affirmed. In *Reg. v. Yeadon*, upon an indictment containing counts for inflicting grievous bodily harm, maliciously cutting, stabbing, and wounding, and occasioning actual bodily harm, it was held that a verdict of guilty of a common assault might be returned. In the course of the argument in that case, Martin, B., said, “that the chairman in effect told the jury that they had no power to find the man guilty of a common assault upon the indictment. He ought to have taken the verdict.” And Wightman, J., said, “It was substantially a misdemeanor. The chairman ought to have taken the verdict of guilty of a common assault, which was not tanta-

mount to an acquittal;" or, in other words, that the prisoner might have been found guilty of a common assault. The conviction will be therefore affirmed.

The rest of the Court concurred.

*Conviction affirmed.*

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CANWELL AND  
DUNN.

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*Maliciously  
wounding—  
Indictment—  
Verdict.*

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REG. v. CANWELL AND DUNN.

Case reserved for the opinion of this Court.

The prisoners William Canwell and William Dunn were indicted at the Easter General Quarter Sessions, 1869, of the North Riding of Yorkshire for a misdemeanor, upon an indictment, of which the following is a copy :

North Riding of Yorkshire, } The jurors for our Lady the Queen,  
to wit. } upon their oath, present, that  
William Canwell and William Dunn, on the 2nd of February, 1869,  
unlawfully and maliciously did inflict grievous bodily harm upon  
one Henry Broomfield.

Upon this indictment the jury returned a verdict of " Guilty of a common assault."

The counsel for the prisoner contended that the prisoner could not be convicted of a common assault on that indictment, and therefore that the verdict amounted to an acquittal.

The Court thereupon postponed judgment, and reserved the question of law for the consideration of the Justices of either Bench and Barons of the Exchequer, viz., Whether this conviction can be sustained ?

In the meantime the prisoners were admitted to bail to appear at the next Court of Quarter Sessions of the North Riding of Yorkshire to receive judgment if called upon.

JOHN R. W. HILDYARD,  
Chairman.

*A. Simpson*, for the prosecution.

No counsel appeared for the prisoners.

By the COURT: The judgment will follow the decision in *Reg. v. Taylor*.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 29, 1869.*

(Before KELLY, C.B., BYLES, J., LUSH, J., CLEASBY, B., and  
BRETT, J.)

REG. v. J. A. ALSOP. (a)

*Perjury—Materiality.*

*On the trial of A., for perjury, in an affidavit made by him, and used on the taxation of costs, the signature to the affidavit was proved to be in A.'s handwriting, but there was no evidence that A. was the person who swore to the truth of the affidavit. The defendant was then called as a witness, and swore that the affidavit was used before the taxing master when A. was present, and that it was then publicly said that it was A.'s affidavit. The defendant was then indicted for perjury committed on A.'s trial, and the indictment alleged that it was a material question on such trial whether A. was so present before the taxing Master, and whether the affidavit was then used in A.'s presence, and whether it was then stated publicly that the affidavit was A.'s.*

*The defendant having been found guilty, it was*

*Held, on a case reserved, that the above questions were material ones on the trial of A.*

CASE reserved for the opinion of this Court by the Recorder of London.

The defendant was at the February Sessions, 1869, of the Central Criminal Court, convicted before me of wilful and corrupt perjury committed by him in the evidence which he gave before me at the preceding session of this Court upon the trial of one James Coutts for perjury.

Coutts was indicted for perjury committed in an affidavit made by him in a cause of *Kelsey v. Coutts*, and which affidavit had been afterwards made use of before the Master upon the taxation of the costs in the said action.

Proof was given that the signature to the affidavit was in the handwriting of Coutts, but no other proof was given that he was

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the person who had made the affidavit, the commissioner who administered the oath being unable to identify him.

The case of *Reg. v. Morris* (Leach C. C. 50) was referred to.

The present defendant, John Alfred Alsop, was then called, and swore that the affidavit in question was used before the taxing Master upon the adjourned taxation, and that the defendant Coutts was then present, and that it was publicly mentioned, so that everybody present must have heard it, that the affidavit was the affidavit of James Coutts.

The indictment against the present defendant Alsop alleged that it was a material question upon the trial of the said James Coutts, whether the said James Coutts was present on the 14th of November before the Master on the taxation of the said costs; and whether or not on the said 14th of November the said affidavit was used and read in the presence of Coutts; and whether or not, on the occasion of the taxation of the said costs, it was stated publicly in the presence and hearing of Coutts that the affidavit was his.

Upon the trial, it was objected that the above-mentioned matters were not material questions for inquiry upon the trial of Coutts, as the particulars sworn to related to matters occurring subsequently to the making of the affidavit, and were tendered merely as collateral proof that the affidavit had been made by Coutts, and that the only matter material for inquiry was the truth or falsehood of the statement contained in that affidavit.

The opinion of the Court for the consideration of Crown Cases Reserved is requested whether the above-mentioned matters were material to the issue involved in the trial of Coutts, and whether the conviction should stand or be reversed.

The defendant was admitted to bail with sureties for his appearance at the session next after the judgment of the Court is pronounced upon these points.

RUSSELL GURNEY, Recorder of London.

*Poland*, for the prisoner.—In this case there was evidence that some person had sworn the affidavit, and the signature of the affidavit being in Coutts's handwriting, it was unnecessary to go further and prove the identity of Coutts as the person who swore to the truth of the affidavit. This is like the case of *Reg. v. Morris* (1 Leach C. C. 50; 2 Burr. 1189), where the defendant was indicted for perjury in an answer in Chancery, and it was proved that the signature to the answer was in the defendant's handwriting, and also the signature of the Master before whom the affidavit was sworn was also proved; and although it was objected that there was no proof of the identity of the defendant as the person who swore the answer, it was held that this was unnecessary. [BRETT, J.—The jury might have disbelieved the evidence as to the defendant's signature.] In this case there was no doubt as to the signature. [LUSH, J.—If the Master had been called to identify the person who swore the affidavit, you would

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Perjury—  
Evidence—  
Materiality.

**Rsa.**  
**J. A. ALDER.**  
 ———  
 1869.  
 ———  
*Perjury—*  
*Evidence—*  
*Materiality.*

say that his evidence was immaterial, although it is corroborative of the fact that the signature is the defendant's. **KELLY, C. B.—** Your argument must go to the length of contending that, all such corroborative evidence is immaterial.] It was surely unnecessary to prove that the affidavit was used before the taxing Master.

*Waddy*, for the prosecution, was not called upon to argue.  
 By the COURT :

*Conviction confirmed.*

## COURT OF CRIMINAL APPEAL.

*April 24 and May 1, 1869.*

(Before **KELLY, C.B., BYLES, J., LUSH, J., CLEASBY, B., and BRETT, J.**)

**REG. v. KEAN AND OTHERS.(a)**

*Evidence—Bankruptcy examinations—12 & 13 Vict. c. 106, s. 117—24 & 25 Vict. c. 134, s. 203.*

*To render an examination of a bankrupt reduced into writing under 12 & 13 Vict. c. 106, s. 117, admissible in evidence as a deposition under the seal of the Court, pursuant to 24 & 25 Vict. c. 134, s. 203, it must appear that his answers after they were reduced into writing were signed and subscribed by the bankrupt.*

**C**ASE reserved by Mr. Justice Hannen for the opinion of this Court :

The accused were tried before me at the last Stafford Assizes for conspiracy.

The indictment alleged that after a petition in bankruptcy by the prisoner William Kean, the prisoners, intending to defraud and defeat the creditors of William Kean, sixty days prior to his adjudication in bankruptcy did conspire, confederate, and agree together to remove, conceal, and embezzle a certain part of the property of the said William Kean, to the value of 10*l.* and upwards, with intent to defraud the creditors of him the said William Kean, and did remove, conceal, and embezzle the said goods with intent to defraud the creditors of the said William Kean.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



The proceedings in the Court of Bankruptcy for the Birmingham District in the bankruptcy of William Kean were duly proved, and in support of the prosecution certain documents were offered in evidence, which appeared to be sealed with the seal of the said Court.

These documents had the following heading :

The Bankruptcy Act, 1861.

In the Court of Bankruptcy for the Birmingham District.

Before Registrar Tudor.

In the matter of William Kean, of West Bromwich, timber merchant.

This 6th day of January William Kean, the bankrupt, having made and signed the declaration required by the statute in that case made and provided, and, being examined to the following questions, returned the following answers.

Then followed what purported to be the questions and answers of the bankrupt.

Another document was headed as follows :

Thomas Smith having been duly sworn, and, being examined at the time and place above mentioned, to the following questions, returned the following answers.

Then followed questions, and what purported to be answers of the prisoner Kean.

A similar heading preceded questions and what purported to be the answers of the prisoner Thomas Smith.

None of these documents were signed by the person whose examination it purported to be.

Evidence was given that the prisoners were respectively examined at the Birmingham Court of Bankruptcy, and that a shorthand writer took notes of their examination, but the shorthand writer was not called.

It was objected on behalf of the prisoners that these documents were not admissible in evidence.

I admitted them, but reserved the question as to each of the prisoners whether what purported to be his examination was admissible in evidence against him.

The jury found all the prisoners guilty.

I postponed judgment until the opinion of the Court for Crown Cases Reserved upon the above case should be obtained, and admitted the prisoners to bail to appear and receive judgment.

JAMES HANNEN.

*Anstie*, for the prisoner.—The conviction ought to be quashed ; for the evidence objected to ought not to have been received. The documents were admitted in evidence at the trial under the 203rd section of "The Bankruptcy Amendment Act, 1861" (24 & 25 Vict. c. 134), which enacts—"That any petition for adjudication, or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certi-

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Bankruptcy—  
Evidence.

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v.  
KEAN AND  
OTHERS.  
—  
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—  
Bankruptcy—  
Evidence.

ificate, deposition, or other proceeding or order in bankruptcy, or under any of the provisions of this act, appearing to be sealed with the seal of any Court under this act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and, whether for the purposes of this act or otherwise, be admitted in all Courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, and be deemed respectively records of such Court, without any further proof thereof; and no such copy shall be receivable in evidence unless the same appear to be so sealed, except where otherwise in this act specially provided.” [LUSH, J.—This document would come under the word “deposition” in that section.] Yes; but these were not proved to be depositions, because it did not appear that the prisoners had signed them. The examinations were taken under the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 117, which enacts — “That the Court may summon any bankrupt before it, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time appointed by the Court (having no lawful impediment made known to and allowed by the Court at such time), it shall be lawful for the Court, by warrant, to authorise and direct any person or persons the Court shall think fit, to apprehend and arrest such bankrupt, and bring him before the Court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the Court, it shall be lawful for the Court to examine such bankrupt after he shall have made and signed the declaration contained in the Schedule (W.) (a) to this act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination so reduced into writing the said bankrupt shall sign and subscribe.” The bankrupt is not to be examined until after he has made and signed the declaration in Schedule (W.), and, after he has been examined, his answers are to be reduced into writing, and the examination so reduced into writing is to be signed and subscribed by the bankrupt. Here

(a) SCHEDULE (W.)

“THE BANKRUPT LAW CONSOLIDATION ACT, 1849.”

*Form of declaration to be made by the bankrupt or the bankrupt's wife.*

I, A. B., the person declared a bankrupt under a fiat in bankruptcy dated the day of [or, under a petition for adjudication of bankruptcy, filed on the day of in the year of our Lord ], or, I, C. D., the wife of A. B., declared a bankrupt under a fiat in bankruptcy dated the day of [or, under a petition for adjudication of bankruptcy, filed on the day of ], do solemnly promise and declare that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

(Signed) A. B. [or, C. D., the wife of the said A. B.]

there was no evidence that that had been done, and therefore the examination was inadmissible in evidence. In *Reg. v. Scott* (25 L. J. 128, M. C.; 7 Cox Crim. Cas. 164), a compulsory examination under that section was admitted, but there the declaration required by the statute was signed.

No counsel appeared for the prosecution.

*Cur. adv. vult.*

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*Bankruptcy—  
Evidence.*

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*May. 1, 1869.*

KELLY, C. B.—In this case the Court is called upon to determine whether certain documents, termed depositions in bankruptcy, were admissible in evidence. By sect. 203 of the Bankruptcy Act of 1861, documents like those in question, bearing the seal of the Bankruptcy Court, are admissible in evidence; but when we refer to the Bankruptcy Act of 1849, s. 117, under which the depositions in question appear to have been made, we find that, to make the depositions available, they must be subscribed by the persons examined. Here neither the original depositions nor the copies reduced into writing were signed. Under these circumstances, they were not depositions at all, and were wholly inadmissible in evidence. Consequently the conviction must be quashed.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*May 1, 1869.**(Before KELLY, C.B., KEATING and LUSH, JJ., CLEASBY, B., and  
BRETT, J.)**REG. v. MEAKIN. (a)**False pretences—Representation that goods were unencumbered.*

*On the trial of an indictment against the prisoner for pretending that his goods were unencumbered, and obtaining thereby 8l. from the prosecutor with intent to defraud, it appeared that the prosecutor lent money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of prisoner and another person, and a declaration made by prisoner that the furniture was unencumbered. The declaration was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the furniture to another person, but not to its full value :*

*Held, that there was evidence to go to the jury in support of a charge of obtaining money by false pretences.*

**C**ASE reserved for the opinion of this Court by Sir Thomas Tilson, Chairman.

At the General Quarter Session of the Peace holden at Reigate, in and for the county of Surrey, on Tuesday, the 6th of April, 1869, William Meakin was tried and convicted on the following indictment :

Surrey, } The jurors for our Lady the Queen, upon their oath,  
to wit. } present, that William Meakin, on the 25th of November, 1868, unlawfully and knowingly did falsely pretend unto Thomas John Williams that the goods of him, the said William Meakin, were unencumbered, and that a certain pretended bill of sale of the said goods, which pretended bill of sale the said William Meakin then delivered to the said Thomas John Williams, was a good and valid bill of sale of the said goods to the said Thomas John Williams. By means of which said false pretences the said William Meakin did then unlawfully obtain from the said Thomas

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

John Williams 8*l.* 19*s.* 5*d.* in money, with intent to defraud, whereas, in truth and in fact, the said goods of him, the said William Meakin, were not unencumbered, nor was the said pretended bill of sale a good and valid bill of sale of the said goods to the said Thomas John Williams against the form of the statute in such case made and provided.

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The following was the evidence:—

Thomas John Williams (money lender, 68, Lorimore-road, Walworth).—In November last, some time prior to the 25th, I saw prisoner. On the 25th I saw him at the house of the gentleman who prepared the bill of sale. In the evening he had the money at nine p.m. He produced to me a declaration made on the same day before a commissioner for taking affidavits, and signed by himself, stating that the furniture was his, that he had not charged or encumbered it, and that he would not remove it, that he proposed to borrow 20*l.* upon it, and that there were no judgments against him. [The declaration was put in and read.] After that I let him have 8*l.* 19*s.* 5*d.* The inducement to let him have it was believing there was value in his furniture, and that it was his own. He then executed a bill of sale. [The bill of sale was put in and read.] I saw it signed by him. I did not register it till some time afterwards. At the same time he gave me a promissory note, dated 25th of November, 1868, for 12*l.* The joint and several note of himself and of John Holton, payable on demand. [The note was put in and read.] After the bill of sale was registered, I went to Hatcham Park-road and found the goods had been cleared out an hour before. I found them at the Herne Tavern, belonging to his brother. I had not consented to their removal. Before I registered my bill of sale, I was not aware there was another bill of sale. I put a man in possession for three weeks, and after a notice I removed him. I have not been paid one shilling.

Cross-examined: I have carried on my business ten or eleven years. The bill of sale and promissory note are for 12*l.* I handed over to the prisoner 8*l.* 19*s.* 5*d.* I deducted one month's interest, though the note is payable on demand. I took proceedings against Holton, the surety, in the Lord Mayor's Court, after prisoner left Hatcham Park-road. Mr. Noon, of Bucklersbury, is my attorney. The gentleman who prepared the bill of sale is an accountant. Prisoner drew the promissory note. I took no guarantee from Holton. In every case I take bills of sale and promissory notes. I saw the furniture before I lent the money. I have an inventory I made. The house at Hatcham contained two parlours, three bedrooms, and kitchen. The fair value of the furniture between man and man would be from 25*l.* to 30*l.*

Re-examined: I did not lend the money on the guarantee of Holton. I would not have lent the money on the bill of sale or promissory note if I had not had the assurance of the prisoner that the furniture was in his disposition.

Patrick Wood (money lender, 2, Queensbury-chambers, London-

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wall).—About the 12th of November, 1868, prisoner came to me to borrow 20*l.* on his furniture in his house at Hatcham Park-road. I lent it him on the 25th of November, 20*l.* between two and three p.m. He then executed to me a bill of sale [bill of sale put in and read]. He also gave me a promissory note. He never paid a penny. I went to Hatcham Park-road about three weeks afterwards, the goods were gone. I found them at the Herne Tavern. I took possession of them and sold them. The piano was gone. I never saw it.

Cross-examined : The bill of sale recites a loan of 25*l.* I gave prisoner 20*l.* I believe prisoner was managing the tavern for his brother. It is a pretty large house. We removed the goods from the tavern. We got 6*l.* for them, and had to pay expenses. I gave prisoner no notice, but believe his wife and friends were present at the sale.

At the close of the case for the prosecution, the counsel for the prisoner contended that there was no case to go to the jury, inasmuch as the case was precisely similar to *Rex v. Codrington* (1 C. & P. 661), and that on the authority of that case the jury should be directed to acquit the defendant.

The Court, however, having referred to the cases of *Reg. v. Burgon* (25 L. J. 105, M. C.), and *Reg v. Crossley* (2 Moo. & R. 17), considered that the case should be left to the jury, and put it to the jury, that if the defendant made the representations charged in the indictment, and if they were false, and if they constituted an essential inducement to the prosecutor to part with his money the jury should find the defendant guilty, and they returned a verdict of guilty accordingly ; but, on the application of the defendant's counsel, the Court granted a case for the determination of the Court for consideration of Crown Cases Reserved, whether on the above facts, on the authority of *Rex v. Codrington*, the jury should not have been directed to acquit the defendant.

Judgment was respited, and consent given to defendant being bailed, but as yet he has not found bail.

THOS. TILSON, Chairman.

*J. Thompson*, for the prisoner.—It is submitted that there was no evidence to support the indictment. No doubt the declaration that the goods were unencumbered was untrue at the time it was handed to the prosecutor by the prisoner, but that was no more than a misrepresentation in respect of one of several matters which went to make up the transaction, and for which the prisoner, though civilly liable, was not amenable to the criminal law. In *Rex v. Codrington* (1 Car. & P. 661) where the defendant was charged with obtaining money by falsely pretending that he was entitled to a reversionary interest in a sum of money, when in fact he had previously disposed of it, Littledale, J., said : "The doctrine contended for on the part of the prosecution would make every breach of warranty, or false assertion, at the time of a bargain a transportable offence. Here the party bought the



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property, and took as his security a covenant that the vendor had a good title. If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action." In *Rex v. Crossley* (2 M. & R. 17), where the prisoner was indicted for obtaining a loan of money (300*l.*) by falsely pretending that he was prepared with funds to pay a large sum, all but 300*l.*, it was proved that not only was the prisoner not in possession of such funds, but was at the time insolvent, and did not intend so to apply the 300*l.* PATTESON, J., said: "The words of the act are very large, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* by a deliberate falsehood, averring that he had all the funds to take up the bill except 300*l.*, when, in fact, he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, the jury ought to convict the prisoner." [BRETT, J., read on: "In the case of *Rex v. Oodrington*, it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling." That passage gets rid of *Oodrington's case*.] Scarcely, for the observation is hardly consistent with the facts stated in the report of it. In *Reg. v. Burgon* the facts were very strong, and showed that the whole device was a mere sham. So, also, in *Reg. v. Watson* (27 L. J. 18, M. C.), it was held that if a person is induced by false representations as to the nature and profits of a business to enter into and continue in partnership with another, and to give him money as part of the capital of the concern (the whole scheme not being a mere sham), the latter cannot be indicted for having obtained the money by false pretences. The test, it is submitted, is not whether any of the incidents to the contract were false, but whether the whole was a fraudulent affair and a mere sham. The representation in this case was no more than saying that the goods were not encumbered to their full value.

No counsel appeared for the prosecution.

KELLY, C. B.—The conviction must be affirmed. The prisoner falsely represented that his goods were unencumbered, but the truth was, at the time he made that statement, they were encumbered by a bill of sale, which he had executed only a few hours before, and he must therefore have known that the representation was false. The only question reserved for us is, whether on the facts the chairman ought to have withdrawn the case from the jury, and directed an acquittal. It is impossible to support such an argument.

The rest of the Court concurring,

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*April 24, and May 10, 1869.*

(Before KELLY, C.B., BYLES, J., LUSH, J., CLEASBY, B., and  
BRETT, J.)

REG. v. ELIZA LUMLEY.(a)

*Bigamy—Onus of proof of first husband or wife being alive at the  
time of the second marriage.*

*On a prosecution for bigamy, it is incumbent on the prosecutor to  
prove that the husband or wife, as the case may be, was alive at  
the date of the second marriage.*

*There is no presumption of law of the continuance of the life of the  
party for seven years after the date at which he or she was proved  
to have been alive.*

*The existence of the party at an antecedent period may or may not  
afford a reasonable inference that he or she was alive at the date  
of the second marriage ; but it is purely a question of fact for the  
jury.*

CASE reserved for the opinion of this Court by Mr. Justice  
Lush.

The prisoner was tried before me at the last sittings of the  
Central Criminal Court, and convicted of bigamy.

The first marriage was alleged to have taken place at St.  
Heliers, in the island of Jersey, in the year 1836.

The question upon this part of the case is whether the evidence  
offered was admissible and sufficient to prove that marriage.

Mr. Le Breton, an English barrister, was the witness called to  
prove the law of Jersey.

He stated that he was a native of Jersey, and familiar with the  
law of the island, but that he was not an advocate, and had never  
practised there.

That before and up to 1842 a register book of marriages was  
required by the law to be kept, and that a marriage solemnised  
by a clergyman there, and recorded by him in the register, was  
valid without the signature of the parties in the book.

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That in 1836 the Rev. Hue Corbett was the rector of St. Heliers, and that he died in 1838.

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In his cross-examination he stated that he had a special reason for knowing the law of Jersey, having been for many years agent in this country for the States and their Crown Officer in the Privy Council. That cases relating to marriages had come before him.

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He added that a male of fourteen and a female of twelve might in 1836 have contracted marriage *per verba de presenti*, according to the general law of Europe, which prevailed in Jersey; that a girl of twelve might have married without the consent of her parents if banns had been put up and called on three successive Sundays, and no opposition offered, and if it were solemnised by a clergyman of the Church of England. That he was not aware of any instance in which such a marriage had been held valid or contested, the case had not arisen. That such a marriage without consent was valid until set aside in the Court of the Dean of Jersey.

He further stated that it was the invariable practice in Jersey for clergymen to keep a register of marriages and baptisms; that it was kept generally at the clergyman's house, but occasionally in the parish chest, but then it was in the custody of the rector; that such books, upon the death of the rector, passed to and were kept by his successor.

It was objected that Mr. Le Breton was not a competent witness to speak to the law of Jersey on the subject.

The prosecutor then produced an examined copy of an entry in the register of marriages in the possession of the present rector of St. Heliers, which certified that a marriage was solemnised by the Rev. Hue Corbett, at St. Heliers, on the                      day of                      , 1836, between the prisoner and one Victor.

Neither of the parties appeared to have signed the register, nor any person as a witness to the marriage.

No attempt has been made to obtain the original register.

It was objected, first, that the register would not itself have been receivable; and, secondly, that the copy was not admissible either at common law or by virtue of any statute.

These questions I reserved.

The prisoner lived with Victor in England until the middle of the year 1843, when they separated, and she was taken by her parents back to Jersey, where she resumed her maiden name.

On the 9th of July, 1847, she, describing herself as a spinster, married Captain Lumley, with whom she lived till March, 1864.

About that time he left her to cohabit with another woman, and afterwards, having heard of the previous marriage, instituted the present prosecution.

It must be taken as a fact that nothing was heard of Victor from the time the prisoner left him in 1843. No evidence was given of the age of Victor, nor any of the age of the prisoner, except that

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a witness, who stated that she was forty-eight years old, said that she (prisoner) was her senior.

I directed the jury that there being no circumstances leading to the impression that he had died, Victor must be presumed to have been living at the date of the second marriage.

Whether that direction was right or not, is the other question I reserved for the opinion of the Court.

If the evidence of the first marriage was not admissible or not sufficient, or if my direction, as above stated, was wrong, the conviction is to be set aside.

I admitted the prisoner to bail till the next sessions.

ROBT. LUSH.

*D. D. Keane, Q.C. (Ballantine, Serjt., and Collins with him),* for the prisoner.—The conviction ought to be quashed, for the learned judge misdirected the jury in telling them that Victor must be presumed to have been living at the date of the second marriage. In this case two presumptions arose: one of the continuance of the life of the first husband, and the other of the presumption of the innocence of the accused; and those being conflicting presumptions, the presumption of the innocence of the accused outweighs the other, and ought to have been acted upon. That is the tendency of the authorities in the text-books. In *Best on Evidence*, edit. 1855, par. 323, it is said, "The presumption of innocence is favoured in law." This is a well-known rule, and runs through the whole criminal law; but it likewise holds in civil proceedings. In *Rex v. The Inhabitants of Twynning* (2 B. & A. 386), one of the leading authorities on the subject of conflicting presumptions, it appeared that about seven years before that time a pauper, the wife of one Richard Winter, who enlisted as a soldier and went abroad on foreign service, and was never afterwards heard of, had married one Francis Burns in a little more than twelve months after his departure. On this evidence the Court of Queen's Bench, consisting of Bayley and Best, JJ., held that the issue of the second marriage ought to be presumed legitimate. And the former judge observed, "This is a case of conflicting presumptions, and the question is which is to prevail. The law presumes the continuation of life; but it also presumes against the commission of crimes until the contrary be proved. The facts of this case are that there is a marriage of the pauper with Francis Burns, which is *prima facie* valid, but the year before that took place she was the wife of Richard Winter, and if he was alive at the time of the second marriage it was illegal, and she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved; but the answer is, that the presumption of law is, that he was not alive, when the consequence of his being so is that another person has committed a

criminal act. I think, therefore, that the sessions decided rightly in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time." This language goes much farther than was necessary for the decision of the actual case before the Court, and certainly cannot be supported to its full extent, as appears from a subsequent case of *Rex v. The Inhabitants of Harborne* (2 A. & E. 540). There, in order to support an order for the removal of a female pauper of the name of Anne Smith, it was proved that she had been married to one Henry Smith on the 11th of April, 1831, who had since deserted her; in answer to which it was shown that he had been previously married in October, 1821, to another female with whom he lived until 1825, when he left her; that several letters had since been received from her from Van Dieman's Land, one of which was produced, bearing date twenty-five days previous to the second marriage. The sessions on this evidence presumed the first wife to be living at the time of the second marriage, and quashed the order. On the case coming on for argument before the Court of Queen's Bench, several cases were cited, and *Rex v. Twynning* was relied on as an authority to show that the party asserting the life of the first wife, and thereby the criminality of the husband, was bound to show the continuance of the life up to the very moment of the second marriage; and that the Court was precluded from inferring the life's continuance until the marriage by the strict rule of legal presumption laid down in that case. The Court, however, consisting of Lord Denman, C. J., Littledale and Williams, JJ., held that the conclusion drawn by the sessions from the evidence was proper. Lord Denman, in the course of his judgment, expresses himself as follows: "The only circumstance raising any doubt in my mind is the doctrine laid down by Bayley, J., in *Rex v. Twynning*. But in that case, the sessions found that the plaintiff was dead and this Court merely decided that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds. The principle, however, upon which they seem to have proceeded was not necessary to that decision. I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. . . . I am aware that Bayley, J., founds his decision on the ground of contrary presumptions; but I think the only questions in such cases are, what evidence is admissible? and what inference may fairly be drawn from it? It may be said, suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances,

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could presume that the party was not alive at the time of the second marriage." Judgments to a similar effect were given by the other members of the Court. There is no conflict, however, between the decisions of *Rex v. Twynning*, and *Rex v. Harborne*, nor does the principle involved in either of them present any real difficulty. The presumption of innocence is a *præsumptio juris*, and, as such, good until disproved. *Rex v. Twynning* decides that the presumption of fact of the continuance of life derived from the first husband's having been shown to be alive about a year previous to the second marriage, ought not to outweigh the former presumption in the estimation of the sessions or the jury; while *Rex v. Harborne* decides that if the period be reduced from twelve months to twenty-five days it would be otherwise, and that the sessions or a jury might, in their discretion, presume the first husband to be still living. This view of those cases is confirmed by the judgment of the House of Lords, in *Lapsley v. Grierson* (1 Ho. Lords Cas. 498)." The marginal note of *Lapsley v. Grierson* is, "There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act, because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered." Lord Campbell, in his judgment, said: "We have been much pressed with the case of *Rex v. Twynning*; but what is there said by Bayley, J., has been much misunderstood. He who was one of the most learned, accurate, and conscientious of judges never laid down what in this argument has been attributed to him. All that he said was that there were presumptions of law on both sides, and that as the Quarter Sessions had come to a conclusion on the facts, the Court of King's Bench would not say that in fact they had come to a wrong conclusion. In the subsequent case of *Rex v. Harborne*, Lord Denman intimated a strong opinion that the *onus* of proof lay on the party setting up the marriage." In *Nepean v. Doe d. Knight* (2 Sm. L. Cas. 476; 2 M. & W. 912), it was held that when a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to anyone to establish the precise time of such person's death he must do so by evidence of some sort to be laid before the jury for that purpose beyond the mere lapse of seven years since such person was last heard of. In *Reg. v. Curgenwen* (10 Cox Crim. Cas. 162), it was held that the burthen was on the prosecution of proving that the prisoner knew that his first wife was alive at the time of the second marriage, they having been living apart for seven years preceding the second marriage, and the Court followed the decision of Wightman, J., who ruled on a trial for bigamy (*Reg. v. Heaton*, 3 Fos. & Fin. 819) that the burthen of proving that the prisoner knew of his first wife being alive within seven years of the second marriage was upon the prosecution.



*Giffard*, Q.C. (*Besley* and *Gough* with him), was then called on to argue for the prosecution. (a) The conviction was right. There were no circumstances proved at the trial that would lead to the impression that Victor was dead at the time of the second marriage. [LUSH, J.—There was no evidence that he had gone away in a consumption, or anything of that kind.] He was proved to be alive in 1843, and the continuance of life is to be presumed. That presumption is modified by the proviso in 24 & 25 Vict. c. 100, s. 57, that nothing in that section shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time. [KELLY, C.B.—Is there any authority that where a first husband has been proved to be alive four years before the wife's second marriage, a presumption arises that he continued alive at the time of the second marriage?] No. But the cases speak of the presumption of the continuance of life up to seven years from the time when last shown to be alive. The jury must be taken by their verdict to have found that the husband was alive at the second marriage. [KELLY, C.B.—As I understand, the point was not left to the jury at all. LUSH, J.—No; I virtually withdrew it from them.]

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LUSH, J.—We are of opinion that the direction to the jury in this case, viz., that there being no circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage was erroneous. In an indictment for bigamy it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong—almost irresistible—that he was living on the latter day; and the jury would, in all probability, find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Now, the question is entirely for the jury. The law makes no presumption either way. The cases cited (*Rex v. Twynning*, *Rex v. Harborne*, and *Doe d. Nepean v. Knight*) appear

(a) Lush, J., stated that the jury must be taken to have found their verdict in obedience to his ruling at the trial.

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to us to establish this proposition. Where the only evidence is that the party was living at a period more than seven years prior to the second marriage there is no question for the jury. The proviso in the act (24 & 25 Vict. c. 100, s. 57) then comes into operation and exonerates the prisoner from criminal culpability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature by this proviso sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years a presumption arises that he is still living. That, as we have said, is always a question of fact. Being of opinion upon this ground that the conviction must be quashed, it becomes unnecessary to consider the other points raised.

*Conviction quashed.*

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### COURT OF QUEEN'S BENCH.

(Before MELLOR, J., LUSH, J., and HANNEN, J.)

*April 29, 1869.*

WALKER v. THE MAYOR OF LONDON.

*Writ of restitution—Larceny—Jurisdiction of Court of Queen's Bench—24 & 25 Vict. c. 96, s. 100.*

*The jurisdiction of the Court of Queen's Bench to issue writs of restitution in respect of property stolen was limited to cases where an appeal of robbery had been made, and since the abolition of appeals of robbery no longer exists.*

*The effect of the enactment of the 21 Hen. 8, c. 11, that the owner "shall be restored to the property" stolen from him, and of the similar enactments in 7 & 8 Geo. 4, c. 29, s. 57, and 24 & 25 Vict. c. 96, s. 100, is merely to vest in him the right to the stolen property, leaving him to bring his action or to pursue the remedies pointed out by those enactments.*

IN this case a rule had been obtained by the *Solicitor-General* (Sir J. D. Coleridge) calling on the mayor, commonalty, and citizens of the City of London to show cause why a writ of restitution should not issue commanding them to restore to John Walker the sum of 270*l.*, being the proceeds of the sale of

certain goods stolen from him between Saturday night, the 4th of February, and Monday morning the 6th of February, 1865.

On that occasion 345 watches and other things had been stolen, and also seventy sovereigns. The burglars were arrested, and in a chest belonging to one of them were found fifty watches and a sum of about 340*l.* in Bank of England notes and gold, together with certain banking securities, and amongst others with the London and Westminster Bank for a considerable amount. The burglars were tried, convicted, and sentenced, and an application was made to the Recorder to order the proceeds to be restored, and he ordered that the watches and the seventy sovereigns, the amount of money stolen from Mr. Walker, should be restored to him; but he declined to make any order as to the rest of the property, thinking there was not sufficient evidence that the whole of the property was the proceeds of the robbery on Mr. Walker's premises, and that Mr. Walker must apply to the Crown or the Corporation, whichever had them. The burglars had been guilty of four or five previous burglaries, and the whole of their property was handed over to the Corporation of London, they being entitled by charter to felons' goods within the City of London. Mr. Walker and others petitioned for a restitution, but the Corporation declined to comply with their request.

*Mellish*, Q. C. (with whom was *Archibald*), now showed cause against the rule.—This Court has now no jurisdiction to issue a writ of restitution in respect of stolen property. At common law a writ of restitution was granted only where an appeal of robbery had been made, and appeals of robbery having been abolished, there is no longer power at common law to issue the writ. The powers subsequently given by statute to issue the writ will not enable the Court to do so in the present case. The 21 Hen. 8, c. 11, enacts that “if any felon or felons hereafter do rob, or take away any money, goods, or chattels from any of the king's subjects, from their person or otherwise, within this realm, and thereof the said felon or felons be indicted, and after arraigned of the same felony and found guilty thereof, or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, that then the party so robbed or owner shall be restored to his said money, goods, and chattels; and that as well the justices of gaol delivery, as other justices, afore whom any such felon or felons shall be found guilty or otherwise attainted, by reason of evidence given by the party so robbed or owner, or by any other by their procurement, have power by this present act to award, from time to time, writs of restitution for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party in appeal.” This enabled only the justices of gaol delivery, or other justices before whom the felons were convicted, to award writs of restitution. It does not give the power to any other court. That statute is repealed by 7 & 8 Geo. 4, c. 29, the 57th section of which is substantially

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the same as sect. 100 of 24 & 25 Vict. c. 96, which enacts that, "If any person guilty of any such felony or misdemeanor as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of, or in the knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative, and in every case in this section aforesaid, the Court before whom any person shall be tried for such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner, provided that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order restitution of such security." This, too, only empowers the Court before which the felon is convicted to award a writ of restitution. This Court, consequently, has no jurisdiction, and the rule must be discharged.

The *Solicitor-General* (with him *Crompton Hutton*), in support of the rule.—At common law, no doubt, a writ of restitution only followed on a successful appeal of robbery; but the object of the statutes subsequently passed was to do away with the necessity of a preliminary appeal of robbery, and in addition to give the Court before which the felon has been convicted, power to order the restitution of the stolen goods in a summary manner. 21 Hen. 8, c. 11, enacts in absolute terms that the owner "shall be restored to his said money, goods, and chattels," and then provides that, "as well as the justices of gaol delivery as other justices afore whom any such felon or felons shall be found guilty . . . have power by this present act to award from time to time writs of restitution." The statute was passed in aid of the subject and to enlarge his remedy; it should therefore receive a liberal construction. [LUSH, J.—In case of an appeal of robbery tried here the stolen property was identified before a jury, as it is also in the case of an indictment, whilst Mr. Walker comes here and asks us to determine on affidavits that these things are his property.] All that the Court is called upon to determine on affidavits is the fact of the felon having been indicted and convicted of the felony; for that is all that is necessary to entitle the owner to restitution. The enactments of the statutes subsequent to 21 Hen. 8, c. 11 are in this respect substantially the same as those contained in it. [LUSH,

J.—Is not the meaning of the subsequent statutes this—that in all cases now, whether the goods have got into the possession of the Crown or not, the owner shall be entitled to have them restored, thus abolishing the conditions formerly annexed to the right, and making it absolute? If the construction contended for is not correct, the words “shall be restored” might as well have been omitted from the statute of Hen. 8. [HANNEN, J.—Those words would give the owner a right to the property in the stolen goods, so that he might maintain an action for their recovery. This interpretation gives full effect to the words “shall be restored.”] It is submitted this Court has power to make the order: (*Golightly v. Reynolds*, Lofft. 88 Vin. Abr. tit. Appeal (H.) 540; Hawk. P. C. 156, cap. 23, f. 5.)

*Archibald*, in reply.—In an appeal the right of the party to the stolen goods was tried, but not on an indictment, and this is the reason why a writ of restitution followed on the former, but not on the latter. Coke (3 Inst. 242) says, “And by the statute of 21 Hen. 8, c. 11, restitution is to be granted upon an indictment, &c. For by the common law the party should not be restored to his goods upon an indictment (because it is the suit of the king), albeit the enquest found that the party had made fresh suit. But restitution was to be made upon an appeal which is the suit of the party.” There is no precedent for granting a writ of restitution on an indictment. In *Reg. v. Macklin* (5 Cox Crim. Cas. 218), Alderson, B., says, “I have looked into the law on the subject of the writ of restitution, of which in my experience I never knew an instance.” In *Golightly v. Reynolds* (Lofft. 90), Lord Mansfield says, “I don’t see why trover is not good. The statute puts an indictment in the same case as a writ of appeal. The statute says it shall be restored, but leaves the party to his own way of recovery. Since this statute it gives him a particular remedy, but does not take away his other remedy.” This shows that the words “shall be restored” have a meaning and force in the statute without the interpretation contended for by the other side. So Lord Campbell, C.J., in *Scattergood v. Sylvester* (15 Q. B. 510), “On reference to the stat. 21 Hen. 8, c. 11, and 7 & 8 Geo. 4, c. 29, we are satisfied that the property is revested on conviction. By the stat. 21 Hen. 8, c. 11, the owner was restored to his goods. How could that be, unless he had a right to recover them? By the subsequent statute, ‘the property shall be restored.’ How is this provision to be executed effectually unless the right is restored? It may be matter of regret, certainly, when an order of restitution is not made so as to obviate the necessity of an action. But the order is not a condition precedent to the revesting of the property.” Hawkins’s Pleas of the Crown, title “Appeal,” was also referred to.

MELLOR, J.—We are all of opinion that in this case the rule must be discharged, and we have come to this conclusion on the following considerations. It appears to us that the stat. of 21 Hen. 8, c. 11, in providing that the party robbed, or the

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owner, "shall be restored to" the money, goods, or chattels of which he has been robbed, on the indictment and conviction of the felon, left untouched the process formerly existing for the recovery of stolen goods, but gave in addition, to the person robbed, the right to recover his goods by action, by virtue of the words in the act that he "shall be restored to them." The jurisdiction was then exercised by the Court of Queen's Bench, and by that only; and that jurisdiction was not taken away by the act, though it went on to give other remedies in the words that follow, "and that as well the justices of gaol delivery as other justices afore whom any such felon or felons shall be found guilty or otherwise attainted, by reason of evidence given by the party so robbed, or owner, or by any other person by their procurement, have power by this present act to award, from time to time, writs of restitution for the said money, goods, and chattels, in like manner as though any such felon or felons were attainted at the suit of the party in appeal." The meaning of this was that if the stolen goods were identified before the justices before whom the felon was tried and convicted, there should be a summary remedy by application to those justices to have the goods restored, just as the Court of Queen's Bench used to order restitution in the case of an appeal. Up to the end of the reign of George III., the proceeding by appeal of robbery, though it had become obsolete, had not been abolished; but when the appeal was abolished, then the jurisdiction of the Court of Queen's Bench to issue writs of restitution ceased to exist, as this Court had no authority to award a writ of restitution except as following on an appeal. The intention of the statutes passed subsequently to that of Hen. 8, seems to have been to extend still further the remedy given by it, giving to the Court before which any felon has been tried and convicted, power to award writs of restitution of the stolen property, or to order the restitution of it in a summary manner, but giving the power to such Court only. Therefore it appears to me that this Court has no longer jurisdiction to award a writ of restitution in a summary manner, because we have not now existing the procedure by way of appeal on which the jurisdiction was formerly founded. For these reasons I think that the rule must be discharged.

LUSH, J.—I am of the same opinion. This Court has no jurisdiction at common law to issue writs of restitution. It had power only to order restitution of the stolen goods as part of the procedure by appeal. I cannot find in the statute of Hen. 8 any words to lead me to suppose that the Legislature, in passing it, intended to confer on this Court such a jurisdiction as that which has been contended for to-day. The words relied on as giving that power will not bear the meaning given to them, and in answer to the argument that otherwise they must be taken to be redundant, I say that I can find abundant reasons for putting them into the statute. The words enacting that the owner of the stolen goods "shall be restored to" them, give the owner an



absolute right to them, which he had not before, and which he can assert by action; and the next part of the act points out a summary remedy by which he can obtain possession of them, from the Court before whom the felon has been convicted.

HANNEN, J.—I am of the same opinion. I think the language of the last statute passed on this subject must be construed with reference to the first one, that of 21 Hen. 8, c. 11. That statute provides that the owner of the stolen property “shall be restored to” it; and the meaning of that I conceive to be that he shall have a right to have his stolen property restored to him, and that he shall be entitled to pursue such remedies as the law gives him for that purpose. The statute having done that, then goes on to give him an additional remedy; he may get from the Court before whom the felon has been convicted, a writ of restitution, “in like manner as though any such felon or felons were attainted at the suit of the party in appeal.” This left it still necessary, if the owner desired to obtain restitution otherwise than by the summary method here given, to proceed by the former method of appeal. Before the passing of the last act on the subject the proceeding by appeal was abolished, and in the last act (24 & 25 Vict. c. 96), we have the words similar to those in the former acts, that “the property shall be restored to the owner or his representative.” Remembering that the proceeding by appeal had been abolished before this statute, the construction of these words contended for by the Solicitor-General would amount to this, that “shall be restored” means “shall be restored by writ of restitution.” Now I think it is quite clear that the Legislature did not mean that, otherwise they would have said it in express words, because the writ of restitution is referred to in a subsequent part of the section. I think, then, that we give full meaning to the words of the section in holding that they vest the right to the stolen property in the owner or his representative, and that he is to have a particular remedy either by writ of restitution from the Court before whom the felon has been convicted, or by an order for restitution in a summary manner. The proceeding which was the necessary foundation of the jurisdiction of this Court having been taken away, I am of opinion that there is no power in this Court to award a writ of restitution in the present case.

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*Rule discharged.*

Attorneys for Crown, *Field, Roscoe, and Co.*  
Attorney for defendants, the *City Solicitor*.

## COURT OF QUEEN'S BENCH.

May 1 and 11, 1869.

(Before COCKBURN, C.J., MELLOR, J., LUSH, J., and HAYES, J.)

SARAH RACHEL LEVERSON v. THE QUEEN (in error).

*Central Criminal Court—Constitution of the Court—Presence of two judges during a trial—Several Courts—Jurisdiction of the Judge of the London Small Debts Court.*

*By the 4 & 5 Will. 4, c. 36, s. 1 (Central Criminal Court Act), the Lord Mayor for the time being, the Lord Chancellor and Lord Keeper of the Great Seal, and all the Judges for the time being of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer . . . . the Aldermen of the City of London, the Recorder, the Common Serjeant, the Judges of the Sheriffs' Court . . . . are to be the judges of the Central Criminal Court. By sect. 2, after describing the limits of the said act as to area and classes of offences, it is enacted that "it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of all such treasons, murders, felonies, and misdemeanors," &c.*

*The plaintiff in error was tried at the Central Criminal Court upon an indictment for obtaining money by false pretences. The trial lasted several days and was had before Mr. Kerr, who was originally appointed judge of the Sheriffs' Court, and who upon that Court being afterwards constituted the London Small Debts Court became the judge of such last-named Court. The only other judge who was present at the trial was an alderman; but although several attended on different days, no one and the same alderman attended on each day of the trial. At the time the trial was proceeding other Criminal Courts were being held as branches of the Central Criminal Court. The plaintiff in error having been convicted, she brought error upon the grounds, first, that the same two justices and judges did not inquire of, hear, determine, and adjudge the misdemeanor alleged; secondly, that the said misdemeanors were inquired of by certain of the said justices in a room separate and apart from the others of the said justices then in general sessions assembled and sitting as usual in*

*their ordinary place of sitting, the said room not having been a place duly appointed, &c.; thirdly, that the said Robert Malcolm Kerr was not at the time one of the judges of the Sheriffs' Court of the City of London :*

*Held, first, that the Court was properly constituted by the presence throughout the trial of one and the same judge ; secondly, that two or more courts were properly held at the same time ; thirdly, that Mr. Kerr was a judge of the said Court.*

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**T**HIS was a writ of error brought to reverse the conviction of the plaintiff under the following circumstances.

The plaintiff in error was tried at the Central Criminal Court before Robert Malcolm Kerr, Esq., upon an indictment for the misdemeanor of obtaining money by false pretences. The trial commenced on the 21st and continued during each of the following days to the 25th of September, 1868, when she was found guilty, and sentenced to five years' penal servitude. An application was at the following sessions made to Mr. Kerr that the record of the proceedings should be made up by inserting therein the names of the Aldermen who, with Mr. Kerr, formed the Court on each day, which he ordered to be done.

The writ of error set out the indictment which contained seventeen counts, for obtaining money by false pretences from one Mary Tucker Borrodaile, and for a conspiracy (with others not in charge) to obtain money from the same person. It also set out her plea of not guilty, and that upon a previous trial of the same on the 17th of August, 1868, the jury not being able to agree in their verdict they were discharged.

The writ of error further set out that at the next sessions, held on the 21st of September in the same year, before William Fernely Allen, Esq., Mayor of the said city, Sir Henry Singer Keating, Knight, one of the justices of our said Lady the Queen of Her Court of Common Pleas, Sir Francis Graham Moon, Bart., Sir Robert Walter Carden, Knight, Warren Stormes Hale, Esq., Alderman of the said city, the Right Hon. Russell Gurney, Recorder of the said city, Joseph Causton, Esq., Thomas Scambler Croden, Esq., other of the Aldermen of the said city, Robert Malcolm Kerr, Esq., Judge of the Sheriffs' Court of the said city, and others their fellows, justices of our said Lady the Queen, assigned in form aforesaid, the said Sarah Rachel Leverson was again brought up for trial upon the said indictment.

The writ then proceeded as follows :

“ And for the public convenience and the more speedy despatch of the public business of the said sessions, the said last-named justices do not sit altogether in one room in Justice Hall aforesaid, but constitute themselves into and hold three distinct courts in three several halls at the said session. And the jurors of the said last-mentioned jury for this purpose in due form of law impannelled and returned to wit (setting out their names) being called, come and are in one of the said three dis-

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tinct courts before the said Robert Malcolm Kerr, Esq., and the said Joseph Causton, Esq., chosen, tried, and sworn to speak the truth of and concerning the premises, divers others of the said justices above named being then present in the others of the said courts holding the said sessions, and thereupon the trial of the said Sarah Rachel Leverson is proceeded with before the said Robert Malcolm Kerr, Esq., and the said Joseph Causton, Esq., divers other of the said justices above named being then present in the other of the said courts holding the said session, and it manifestly appearing to the said court here impossible to conclude the trial of the said indictment on the said Monday, the 21st of September in the year aforesaid, therefore the last-mentioned session, and the said trial are by the Court here duly adjourned until Tuesday the 22nd of September, in the year aforesaid."

It then proceeded to set out that on such last-mentioned day the trial was continued "in one of the said courts in the said hall, before the said Robert Malcolm Kerr, Esq., and Warren Stormes Hale, Esq., divers others of the said justices above named being then present in other courts in the said hall holding the said session."

The writ then set out a further adjournment to the 23rd, on which day it was continued "in one of the said courts in the said hall before the said Robert Malcolm Kerr, Esq., and the said Sir Robert Walter Carden, Knight, and the said Joseph Causton, Esq. It then set out a further adjournment to the 24th, when it was continued as aforesaid, before the said Robert Malcolm Kerr, Esq., and the said Sir Robert Walter Carden, Knight, and the said Joseph Causton, Esq. It then set out a similar adjournment to the 25th, when it was continued before the said Robert Malcolm Kerr, Esq., the said Joseph Causton, Esq., and the said Thomas Scambler Croden, Esq. . . . And the said Robert Malcolm Kerr, Esq., as judicial president of the Court in which the trial is had, doth sum up to the said last-mentioned jurors the facts given in evidence on the said trial, and doth direct them upon the law relating thereto, and the said jurors of the said jury, being sworn as aforesaid, say upon their oath that the said Sarah Rachel Leverson is guilty of the premises in the said indictment above specified in manner and form as in and by the said indictment it is alleged and charged against her. Whereupon all and singular the premises being seen and fully understood by the Court here, it is considered and adjudged by the Court here, and the said Robert Malcolm Kerr, Esq., as judicial president thereof, doth pronounce the judgment of the Court, that for the offence and misdemeanor in the first count of the said indictment specified the said Sarah Rachel Leverson be kept in penal servitude for the term of five years now next ensuing," and so of the other counts in the indictment.

The writ then set out the assignment of errors as follows: "That the misdemeanors alleged and charged in the said indict-

ment against the said Sarah Rachel Leverson were not inquired of, heard, determined, and adjudged by two or more justices within the meaning of the statute in such case made. Therefore in that there is manifest error.

“There is also error in this, to wit, that the same two justices and judges of the said Central Criminal Court did not, nor did the same two or more of them inquire of, hear, determine, and adjudge the misdemeanors alleged and charged in the said indictment against the said Sarah Rachel Leverson. Therefore, &c.

“There is also error in this, to wit, that Robert Malcolm Kerr, Esq., before whom the alleged misdemeanors alleged and charged in the said indictment against the said Sarah Rachel Leverson were inquired of, heard, determined, and adjudged was not at the time when the said misdemeanors were inquired of, heard, determined, and adjudged one of the judges of the Sheriffs’ Court of the City of London within the meaning of the statute in that behalf made, nor was he named or appointed by any general committee to be one of the judges of the said Central Criminal Court within the meaning of the said statute. Therefore, &c.

“There is also error in this, to wit, that the several commissions of oyer and terminer, and of gaol delivery, by virtue of which the said Robert Malcolm Kerr, Esq., amongst others, was authorised to inquire of, hear, determine, and adjudge the misdemeanors alleged and charged in the said indictment against the said Sarah Rachel Leverson, had, as regards the said Robert Malcolm Kerr, Esq., determined and become of no effect in law before and at the time of the general session in the said record mentioned. Therefore, &c.

“There is also error in this, to wit, that the said misdemeanors alleged and charged in the said indictment against the said Sarah Rachel Leverson, were inquired of, heard, determined, and adjudged by certain of the said justices in a room separate and apart from the others of the said justices, then in general sessions assembled, and sitting, as usual in their ordinary place of sitting, the said room not having been a place appointed by either of the said commissions or by the said justices, and judges, by virtue and in pursuance thereof, or by any two or more of them, against the form of the statute in such case made. Therefore, &c.

“There is also error in this, to wit, that the indictment and proceedings aforesaid and the matters therein contained are not sufficient in law to warrant the said judgment so given against the said Sarah Rachel Leverson, or to convict her of the misdemeanors aforesaid, or any or either of them. Therefore, &c.

“There is also error in this, that the judgment aforesaid in the form aforesaid is given for our said Lady the Queen, whereas the said judgment by the law of this realm ought to have been given against our said Lady the Queen and for the said Sarah Rachel Leverson. Therefore, &c.

“And the said Sarah Rachel Leverson prays that the judgment aforesaid, for the said errors and other errors appearing in the

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(in error). record and proceedings aforesaid, may be reversed, annulled, and wholly held for nothing, and that she may be restored to all things which by reason of the judgment and proceedings aforesaid she has lost."

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There was a joinder in error.

By the 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act), after reciting that it is expedient for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis, and certain parts adjoining thereto, should be tried by justices and judges of oyer and terminer and gaol delivery in the City of London, it is enacted—"That the Lord Mayor for the time being of the City of London, the Lord Chancellor, or Lord Keeper of the Great Seal, and all the judges for the time being of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the chief judge, and two other judges in bankruptcy, the judges of the Admiralty, the Dean of Arches, the aldermen of the City of London, the Recorder, the Common Serjeant, the judges of the Sheriffs' Court of the City of London for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of his Majesty's Superior Courts at Westminster, together with such others as his Majesty, his heirs, and successors shall from time to time name and appoint by any general commission as hereinafter stated shall be, and be taken to be, the judges of a court to be called the "Central Criminal Court," to which his Majesty and his heirs and successors may direct his general commission as hereinafter mentioned; and which Court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as hereinafter specified.

By sect. 2 it is enacted that "It shall be lawful for his Majesty, his heirs and successors, from time to time to command, and cause to be issued, commissions of oyer and terminer, to inquire of, hear, and determine, all treasons, murders, felonies, and misdemeanors committed within the City of London and county of Middlesex. . . . And also commissions of gaol delivery to deliver his Majesty's Gaol of Newgate of the prisoners therein charged with any of the offences aforesaid committed within any of the limits aforesaid; and it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge, all such treasons, murders, felonies, and misdemeanors, &c."

*Mellish*, Q.C. (*Gibbons* with him).—There are three grounds of error, first—that the act constituting the Central Criminal Court requires the presence of two judges to inquire, hear, determine, and adjudge; secondly, that two courts cannot sit simultaneously at the Central Criminal Court; and, thirdly, that Mr. Kerr had no jurisdiction to sit as judge. As regards the first objection, although Mr. Kerr sat as judge during the whole of the trial, no one and the same alderman sat there each day. They changed from day to day. [*MELLOR*, J.—I see that the writ of error styles



Mr. Kerr the "judicial president." What authority is there for that?] None whatever. It is an innovation. [COCKBURN, C. J.—It is a term unknown to our law; the senior or chief judge, if there be one, is never so styled.] All the judges have co-ordinate powers in the Court. Upon the trial of the seven bishops, each of the four judges charged the jury, and really laid down different law. [COCKBURN, C. J.—In a trial at bar, each judge has a right to express his opinions.] The question here turns entirely upon the language of the 2nd section. It will be seen by the 1st section that a great number and variety of persons are constituted judges of the Central Criminal Court, and amongst them the Aldermen of the City of London, and the judges of the Sheriffs' Court of the City of London for the time being. The 2nd section describes the limits of the jurisdiction of the Court, and it says that "it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge," &c., and the question is, as to the meaning of the words, "or any two or more of them." The statute makes no difference in the *status* of any of the judges, they are all equal, an alderman having the same rights and powers as one of the judges of the Superior Courts. This being the most important criminal Court in the kingdom the Legislature may well have intended that two at least of the constituted judges should sit together and assist in the trial of the cases. [MELLOR, J.—Suppose there were two of the judges of the Superior Courts sitting with three aldermen, could the latter three overrule the decision of the two former?] No doubt they could. [MELLOR, J.—Then a most scandalous state of things would arise.] Nay, an alderman might himself sum up a case to the jury. [MELLOR, J.—Have you considered the caption of the commissions to the judges upon circuit. It is always addressed to two or more. LUSH, J.—The commissions of oyer and terminer and gaol delivery require that two should preside, of whom one of the superior judges shall be one. According to your argument the associate must always be present. The *Solicitor-General*.—The associate and clerk of assize are put into the commission of oyer and terminer and gaol delivery, but not into the commission of assize.] The associate or clerk of assize is always present, or constructively present, during every trial. [MELLOR, J.—I never remember any observations being made by an alderman.] That may be, but they are judges nevertheless; indeed, the Lord Mayor heads all the others. [COCKBURN, C. J.—Are all these parties included in the commission? The *Solicitor-General*.—They are; the commissions are in Court.] The body of judges for the Court is very extensive. The Dean of Arches may sit as a judge, and so may anyone who has been a Lord Chancellor. [MELLOR, J.—I have always considered it to have been necessary to have an alderman present, especially when I have had to pass sentence.] There are several cases in which this question has arisen upon

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proceedings before magistrates. In *Billing v. Prinn and Delabere* (2 W. Bla. 1817), which was an action for false imprisonment against two justices for committing the plaintiff to prison for refusing to affiliate a bastard child, she was examined severally at separate times (but in the same day), and in separate places by the two defendants, who were justices of the peace for Gloucestershire, and they separately signed the warrant of committal. On the trial at the assizes a verdict was returned for the plaintiff, with 5*l.* damages, and upon a rule for a new trial upon the ground that if the two justices joined in and consented to the commitment it was sufficient, though they might examine and adjudge the matter, and sign the warrant separately. De Grey, C.J., said, however, "This case is unfortunately too clear to bear an argument. There is no use in appointing two or more persons to exercise judicial powers unless they are to act together." [LUSH, J.—When a matter is referred to two arbitrators, all acts by them must undoubtedly be done together, even to the signing of the award.] That is so, both minds must act at the same time. In *Rex v. Forrest and others* (3 T. R. 38), it was held that an appointment of overseers must be by the justices in the presence of each other. Ashurst, J., in giving judgment, says, "The justices in appointing overseers do not act ministerially; the statute has vested a discretion in them, and they should act together. And it being a matter of discretion, they should confer together for the purpose of a communication on the subject-matter on which they are to determine. But this cannot be done where they are not together, and when no conference can take place." [COCKBURN, C.J.—We know in fact that no deliberation takes place between the lawyer and the layman, but the judge acts alone.] In *Rex v. The Inhabitants of Hamstall Ridware* (3 T. R. 380), it was held that an indenture of a parish apprentice assented to by the two justices separately is void, and no settlement is gained by serving under it. In that case Lord Kenyon said, "The rule has long been settled to be that the concurrence of justices together is not necessary where the act to be done is merely ministerial, but they must confer together and form a joint opinion where the act is of a *judicial* nature. [COCKBURN, C. J.—If that be so we should have to confer with the aldermen as to the sentence.] I really do not like to suggest what are the powers of the aldermen. [HAYES, J.—They know their rights, for it is often intimated that they have the right to take part in the proceedings though they decline to do so.] They have certainly under the act the same powers as the other judges. However inconvenient it may be, a judicial construction must be put upon the act. As regards the second objection, whether is there any authority for the Court to sit in different chambers? It is clear that at Quarter Sessions the power to sit in two Courts is conferred alone by act of Parliament. The Court of Queen's Bench itself only sits in a second Court, the Bail Court, under act of Parliament, the 57 Geo. 3, c. 11, and subsequently the 11 Geo. 4, and 1 Will. 4, c. 70, s. 1. The second

Court at Quarter Sessions is now held pursuant to the provisions of the 21 & 22 Vict. c. 73, s. 19, which repealed a former enactment upon the same subject. It is only by the Common Law Procedure Act, 1854, that the Courts in Westminster Hall can each sit simultaneously, in two Courts at Nisi Prius. Upon general principles the Court is a single Court, and it cannot divide itself. [COCKBURN, C. J.—At the Assizes, when there is a pressure of business, several Criminal Courts are constantly held at the same time.] At the Assizes the judges sit under a commission to deliver the gaol, and the word “Court” is not mentioned. Here the word “Court” is mentioned. [COCKBURN, C. J.—The Master informs me that he has communicated with Mr. Montague Chambers, who recollects that in the time of the Old Court in the Old Bailey, the Judges, the Recorder, and the Common Serjeant used to sit in separate Courts until dinner, and that in the evening the Recorder alone sat.] The third objection, that Mr. Kerr had no jurisdiction to try the case, arises out of the position that as he is no longer a judge of the Sheriffs’ Court; that Court being abolished, he has no authority to sit at the Central Criminal Court as a judge. The Sheriffs’ Court no longer exists. It is now the London Small Debts Court. He referred to the various local and public statutes upon the subject.

*The Solicitor-General* (*The Attorney-General, Archibald, and Poland* with him).—As regards the first objection. This depends to a great extent upon the language by which the Central Criminal Court was created. The 1st section creates the Court, and names a number of functionaries who are to be judges of the Court, and amongst them we find the judges of the Sheriffs’ Court of the City of London. The judges of the Central Criminal Court do not exercise their functions as individuals, but as a Court, and where that is the case, the powers of the full Court are vested in each individual. The 2nd section directs that a commission is to issue. That places the Court in the same position as though they were persons named in the old common law commission of oyer and terminer, and which is to be executed as under that commission. The commission of oyer and terminer, under which the judges act at the Assizes, is always directed to certain persons, and yet, although the same judge presides, the second person necessary to constitute the Court is not usually the same person throughout. [COCKBURN, C. J.—Although the officer ought to remain, he may temporarily absent himself, and yet be constructively present.] It is the judge who is clothed with the authority of the Court. The legal presumption is certainly that both judges try, though in fact only one does. Upon an indictment for perjury at the Assizes, the indictment would set forth that the perjury was committed before both the judges. [Mellish.—The record of the first trial would be put in, and it could not be contradicted however untrue.] This is a highly technical objection. But supposing a second judge ought to be present all the time,

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his absence would only amount to misconduct on his part, and would be immaterial as regards the valid constitution of the Court unless there were words in the act showing that the same two judges must be present. [COCKBURN, C. J.—The difficulty has arisen from this : that as it was necessary that an alderman should be present, yet as he was not accustomed to exercise any judicial functions, it was thought that it mattered not whether Mr. A. or Mr. B. was present. When, however, you look at the terms of the act of Parliament, it becomes a grave question whether or not a judge can absent himself.] It is in reality only one judge who tries. Suppose at the Assizes a Queen's counsel who is in commission should interfere. [COCKBURN, C. J.—He would have no right to do so unless he sat judicially.] The act does not mean that the same two judges are to be present throughout, for the real judicial power is exercised by one only. A great deal depends upon the word "Court;" clearly, except for the 2nd section, which has the words "or any two or more of them," one would be clothed with the full power of the Court. [MELLOR, J.—We often sit as two only in this Court. COCKBURN, C. J.—We are governed by long established practice. The full number sit when they can, and as many as convenient at other times. Here, however, there is an act of Parliament.] The analogy of justices and arbitrators is not in point. [COCKBURN, C. J.—If you concede that, an alderman may interfere in the trial; each one may do so, although he may only have heard a part of the trial.] The real answer is, that such a state of things would not arise, and would indeed amount to misconduct. [COCKBURN, C. J.—Suppose one judge sat and tried on one day, and then became ill, and then another judge came the next day and continued the trial; could that be done? Would not that be matter of error?] That would no doubt be so. As regards the second point: The practice is now inveterate of sitting in two or more Courts simultaneously, although only one Court is named in the act. It is the duty of the judges to clear the gaol. The act enabling the Quarter Sessions to sit in two Courts arose from the necessity of having some legislative authority for appointing a second officer to record the proceedings of the second Court, and so we find a clause constituting such officer. As regards the third point, that Mr. Kerr had no longer any authority to sit as a judge at the Central Criminal Court, the various acts of Parliament clearly show that his office of judge of the Sheriffs' Court is still retained, though under another name. [COCKBURN, C. J.—The question may be just this. Mr. Kerr was a judge of the Sheriffs' Court. That Court has, in fact, never been abolished, though its name and functions have been altered, and one of the incidents of being such judge is, that he is a judge of the Central Criminal Court. I doubt if Mr. Mellish will insist upon that point.]

*Mellish*, Q.C., in reply.—I have said all that I think necessary upon the third point. The question is, is there error upon the record? I cannot see how the provisions of the 2nd section can be

complied with unless the same two judges sit throughout the trial. [COCKBURN, C. J.—Do you think that the Legislature intended that the ordinary course of proceedings as observed in other Courts upon criminal trials of one judge alone sitting should be departed from in the case of the Central Criminal Court?] I cannot say what was intended. The intention of the Legislature must be gathered from the words used.

COCKBURN, C. J.—As it is of immediate importance that we should give at once an opinion upon the second and third objections, I think we may say that we are of opinion that they fail. As regards the first point we will take further time to consider.

*Our. adv. vult.*

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COCKBURN, C. J.—This was a writ of error upon a conviction at the Central Criminal Court, and the first of the three grounds of error is the only one which presented any difficulty, and upon which we took time to consider; and upon consideration, we are of opinion that this one also is untenable. It is true that in the act establishing the Central Criminal Court it is enacted that "It shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanors," and that such court shall use and exercise all the powers and authorities belonging to justices of Courts of oyer and terminer. Now if this is to be construed to mean that two judges are bound to sit upon a trial, a very serious question will arise whether the provisions of the act have been complied with? But we are all of opinion that such is not the effect of the act. The commissions to be issued are the ordinary commissions of oyer and terminer under which criminal justice has been administered for centuries, and the commissions are to be read by the light of the procedure of the other Superior Courts of criminal judicature. We are warranted in assuming that the Legislature in authorising such a jurisdiction to be exercised intended that the administration of justice should be conducted in the Central Criminal Court according to the universal practice of similar Courts. This view appears to us to be as consistent with the language of the act as with reason. From the earliest times commissions have been issued in the same terms as those employed in this act. In these commissions a specified number of the persons named as composing the Court are always constituted a quorum; yet for centuries the trials under such commissions have been held before a single judge, and the proceedings have nevertheless always been represented as being held, not before one judge, but before the other judges sitting under the commis-

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sion. Now this must have proceeded upon the ground that while the whole body of justices named in the commission constituted "the Court," yet that each judge sitting under it represented the Court, so that whatever occurred before the single judge must be considered as having taken place constructively before the whole Court. Hence, at the Assizes, each trial, even when before a Serjeant-at-Law or Queen's Counsel, is represented on the record as being held before both the superior judges "and others their fellows." It is true that a belief has prevailed that on the trial of indictments before a single judge, the presence of one of the officers of assize (who are always included in the commissions on the circuit) was necessary to constitute the Court; but we think that this was the case only where no other member of the commission is sitting under it, so as to be constructively present. This is borne out by the fact that by the caption of the indictments the proceedings are stated to have been held before both the judges, though only one may have been present. The same thing occurs when the trial is before a Queen's Counsel; while on the Welsh circuit or the Winter circuit, where there is but a single judge, the practice is to represent the proceedings as having been held before the judge and the officer who, being included in the commission, forms part of the Court. All this shows that under a commission of oyer and terminer, not only may the general Court be divided into several Courts, but that each separate Court is considered as held not only before the judge actually sitting, but also constructively before all the members of the commission acting under it. The language of the act (4 & 5 Will. 4, c. 36) and the commissions under it being the same as in the general commissions of oyer and terminer, and the practice described having prevailed for centuries, we cannot suppose any intention that a different principle of construction or a different practice should be introduced. We cannot suppose that while a trial for a capital offence may take place elsewhere before a single judge, the presence of an alderman is essential to the validity of a trial at the Central Criminal Court. Applying the ancient and inveterate practice to the construction of the statute, it appears to us that the presence of a second commissioner in the Court was unnecessary, and it would have been sufficient to state on the record that the proceedings were held before the commissioner and any other judge actually sitting under the commission in one of the other Courts, or indeed before any two judges actually sitting in the principal Court. And as the presence of a second commissioner was unnecessary, we think the record, though it discloses that the second commissioner was not the same during the trial, is sufficient to show that the conviction was valid. It was urged that even if the presence of a second commissioner was necessary, yet, as he would take no part in the proceedings, it was not material that he should be the same; and my brethren are of opinion that this view is well founded, and sufficient to entitle the Crown to judgment. But I am not prepared to adopt that view; and I doubt whether if a



second member of the Court is necessary to constitute the Court, as he is appointed a judge and attends in his character as a judge, he must not be taken to be an integral member of the Court, and entitled to take part in the trial; and as the commission makes no distinction between professional and lay judges, might not, if he thought proper, take part, and even under very special circumstances might not be bound as a matter of duty to take part in the proceedings, just as when two of the superior judges sit on a trial at the Central Criminal Court, the second frequently does. That being so, I cannot but think that if a second judge were necessary, the judge must be the same throughout the trial, just as on a trial before a single judge the judge must be the same throughout, and the cause cannot be heard in part before one judge and in part before another, not only because such a proceeding would be contrary to the established course of all judicial proceedings, and an outrage on all judicial propriety, but also because in such a case the cause would not have been heard by the judge or judges by whom it is determined and adjudged. And I prefer, therefore, to rest my judgment upon the former ground—that the presence of a second commissioner was not necessary. We are all agreed, that on the first ground of error our judgment must be against the plaintiff in error. In disposing of the first ground of error, we have incidentally disposed of the second. When it is settled that the act is to be read by the light of the established practice, the objection necessarily fails. According to the practice of centuries, the judges under these commissions have been in the habit of dividing their Courts. So at the Central Criminal Court, the practice has been to divide the Court, and we hold that the trial was not on that account invalid. As to the last ground, that Mr. Commissioner Kerr had ceased to be qualified to act as a judge under the 4 & 5 Will. 4, c. 36. This objection may be disposed of in a word. It is true that the Sheriffs' Court, as a judge of which Mr. Kerr is a judge of the Central Criminal Court, has been by recent acts of Parliament converted into a County Court, for the purposes for which County Courts have been elsewhere established, within the district in which it previously exercised jurisdiction. But the Sheriffs' Court has never been abolished, and by the saving clause of the 30 & 31 Vict. c. 142, the powers of the judges of that Court have been expressly preserved, and the judges of the Sheriffs' Court having been appointed judges of the Central Criminal Court by the act constituting that Court, it follows that, in respect of the latter jurisdiction, their authority remains unaltered. This ground of error appears to us wholly untenable.

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*Judgment for the Crown.*

Attorney for the plaintiff in error, *Lewis Heritage*.  
Attorneys for the Crown, Messrs. *Lewis and Son*.

## COURT OF CRIMINAL APPEAL.

*May 29, 1869.**(Before COCKBURN, C.J., BRAMWELL, B., MELLOR, M. SMITH, and HANNEN, JJ.)*REG. v. HENRY DEERING.*(a)**Larceny—Servant—Appropriation of money to his own use — Intent.**Money was given to the prisoner for the purpose of paying turnpike tolls at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not—that he had gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates.**The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved as to whether the facts proved a larceny, that the question of felonious intention had been distinctly left to the jury, this Court quashed the conviction.**CASE reserved at Quarter Sessions for the opinion of this Court.**The prisoner was tried at the Adjourned Quarter Sessions for the county of Kent, held on the 4th of March, 1869, on an indictment for stealing 6s., the moneys of Henry Simmons, his master.**The following facts must be taken to have been proved :**The prisoner was a waggoner in the employment of the prosecutor. On the 13th of February last the prosecutor's bailiff sent out four teams of horses with waggons, one of them being in charge of the prisoner.**The prisoners and the other persons in charge were ordered to go with the teams to a place called Snodland to fetch coal.**For the journey which these teams were to take they should**(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.*

have gone through two turnpike gates called the Royal Oak and Snodland gate, and before starting the said bailiff delivered to the prisoner money to the amount of 8s. 8d. for the purpose of paying the tolls at the said gates in respect of all the teams.

On the 25th of February last, the bailiff asked the prisoner if he had paid the tolls at the Snodland gate. The prisoner said he had not. The said bailiff asked him why he had not paid the said tolls, and the prisoner replied that by the road they went no toll was payable, and that he had spent the money, amounting to 6s., on beer for himself and the other waggoners and mates. The prisoner stated the teams had gone by a parish road which only crossed the turnpike road at the gate, and thus no toll was payable.

The jury convicted the prisoner; but, having some doubt whether these facts prove a larceny on the part of the prisoner, the Court reserved the point for the opinion of the Court for the consideration of Crown Cases Reserved, and admitted the prisoner to bail to appear and receive judgment when called upon.

The question for the consideration of the Court is, Whether under the above facts the prisoner could properly be convicted of larceny?

JOHN G. TALBOT, Chairman.

No counsel appeared for the prisoner.

*Barrow*, for the prosecution.—The conviction was right. The law is thus laid down in 2 Russ. on Crimes, 382: "The clear maxim of the common law, established by a variety of cases, is, that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. And this rule appears to hold universally in the case of servants whose possession of their master's goods by their delivery or permission is the possession of the master himself." In this case the prisoner had only a bare charge of the money to pay the turnpike gates with, and the possession remained in the master. No doubt, if a master gives his servant money for his second-class railway fare, and also for refreshments, and the servant were to go third class and not return the difference to his master, that might not be larceny, as the money was given for the servant's own use. [COCKBURN, C.J.—Suppose the master gives the servant money for his railway fare, and he walks and saves the money and spends it?] That is not this case. If a master gives money to a servant to pay a bill with, and the servant does not pay the bill, and appropriates the money to his own use, that is larceny. Here the toll is imposed on the waggons and horses, and the master was liable for it. For the journey these teams were to take, the case states that they should have gone through two turnpike gates. In 2 Russ. on Crimes, 393, it is said: "The

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correct distinction in cases of this kind appears to be that if the owner parts with the custody only, and not with the possession, and the prisoner converts the chattel to his own use, it is larceny, although he had no felonious intent at the time he received it; but if the owner parts, not only with the custody, but also with the possession of the chattel, and the prisoner converts it to his own use, it will not be larceny unless the prisoner had a felonious intent at the time he received the chattel. A servant going off with money given to him by his master to carry to another, and applying it to his own use, has been holden guilty of larceny. . . . Where on an indictment for stealing a shilling, it appeared that the prisoner, who was the servant of the prosecutor, was ordered by him to go for 12cwt. of coals, and that the prisoner received from the daughter of the prosecutor 6s., which she had received from her father to give to the prisoner to pay for the coals, and the prisoner, instead of getting 12cwt. of coals, got only 9cwt., the price of which was 3s. 3d., and gave 4s. to pay for the coals, and received 9d. in change, and on his return he gave the prosecutor's daughter 1s. and made a false statement as to the quantity of coals he had bought, and appropriated the remaining shilling to his own use, Patteson, J., held that the prisoner was guilty of larceny of that shilling: (*Reg. v. Beaman*, R. & M. 433, C. Cas. R.) So where the prisoner was indicted for stealing a sovereign, the property of the prosecutor his master, who had engaged him to take a canal boat on a voyage, and had paid 5l. for his wages in advance, and for the keep of the towing horse, and had given him a separate sum of three sovereigns to pay the tonnage dues on the canal. The prisoner took the boat about sixteen miles, and paid tonnage dues amounting to rather less than 2l., but appropriated the remaining sovereign to his own use. It was urged that the relation of master and servant did not exist. Patteson, J.: "Taking that to be so, it does not appear to me to be material in this case. The prosecutor distinctly swears that he gave this man three sovereigns to pay the tonnage dues, and it appears that he has made away with one of the sovereigns. To constitute a larceny in this case there is no occasion to show that the relation of master and servant existed. If I gave a man money to apply to a particular purpose, and he appropriates it to another purpose, he is guilty of larceny. If a man were to employ another to go somewhere with his horse for a certain price, that other is for that purpose his servant, but if in addition to this he gives him a distinct and separate sum of money to be disbursed in a particular way, and if instead of so disbursing it he appropriates it to his own use, that is felony:" (*Reg. v. Goode*, C. & M. 582.) [M. SMITH, J.—Where is the evidence of the felonious intent here?] The jury must be taken to have found the felonious intent. The only question reserved is whether the prisoner could properly be convicted of felony. [COCKBURN, C. J.—The facts are stated, and the prisoner may have thought that by going

another road he could save the toll, and that it would make no difference to his master which way he went, and that he was entitled to spend what he so saved in beer. That no doubt was very wrong, but did it make him guilty of larceny? M. SMITH, J.—He spent the money openly among the other men. BRAMWELL, B.—The mere spending the money, unless done with a thievish mind or fraudulent intent, was not larceny.]

COCKBURN, C. J.—We think that the right question was not left to the jury in this case; if it had been, in all probability the prisoner would have been acquitted. We come to this conclusion on the special facts in the case.

BRAMWELL, B.—It is not to be assumed that the Court has answered the question submitted in the negative, but we infer from this case that the proper question was not left to the jury.

*Conviction quashed.*

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## NORTHERN CIRCUIT.

*Liverpool, August 14, 1868.*

(Before KELLY, C.B.)

REG. v. SHEPPARD AND OTHERS.

*Indictment under 24 & 25 Vict. c. 97, s. 10—Explosive substance in condition to explode—Whether necessary.*

*S. and others were charged under sect. 10 of the 24 & 25 Vict. c. 97, with feloniously throwing gunpowder against a house with intent to damage :*

*Held (by Kelly, C.B.), that in order to support an indictment under this section it is not enough to show simply that gunpowder or other explosive substance was thrown against the house ; but it must also be shown that the substance was in a condition to explode at the time it was thrown, although no actual explosion should result.*

**I**NDICTMENT in first count charged the prisoners with feloniously damaging a house with gunpowder, a person being in the same.

Second count charged them with feloniously throwing gunpowder against a house with intent to damage.

The prisoners, Alexander Sheppard, John Jolley, and John Sheppard were charged on an indictment framed, as to the second count, under the 10th section of the 24 & 25 Vict. c. 97, with having thrown a bottle containing gunpowder against a house occupied by a person named Joseph Johnson.

The section in question provides that, "Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, working tools, fixtures, goods, or chattels shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony," &c., &c.

This was a trade outrage arising out of a strike among the colliers at the Lindsay pits at Whelling, near Wigan. The colliers were on strike, and the prosecutor is what is called



a "knobstick," he continuing to work at the collieries. It appeared that at about half-past one o'clock on the morning of the 21st of March, the prosecutor heard footsteps as of some one walking about the back and front of his house. He then heard something come against the window frame and fall on the door stone, and then saw a flash of fire; it made no noise of bursting, but flared up. He then went up stairs and looked out, and he then saw a man going up the "brow" in front of his house, and two other men following. On the following morning prosecutor examined the window, and he then found that a hole had been crushed in the window frame, and a quarter of an hour after a policeman picked up the bottom of a bottle about a yard from the door. Later on the same morning prosecutor also picked up the neck of the bottle with a fuse to it; and on the morning after that he picked up about three grains of gunpowder near the same spot. It was subsequently ascertained that a short time previous to the alleged outrage Jolley and Alexander Sheppard were heard in conversation, in the course of which a father and son were mentioned, towards whom the two prisoners referred to, evidently entertained a strong enmity, and who one of them seemed to suggest should be blown up.

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About the same time the three prisoners were seen together at Jolley's house, and then, according to the evidence of a witness named Winstanley, who was present in the house, Jolley got a bottle down from a shelf and put powder into it. He then put a fuse in the bottle and gave it to John Sheppard, and told him to take it to "Studdy's" (meaning Joseph Johnson), and throw it through the window. From a conversation which a witness had with the prisoner John Sheppard after the alleged outrage, it appeared that John Sheppard stated that he had been engaged with a man named Broomhead in the proceedings outside Johnson's house, and he alleged to a certain extent that Broomhead had assisted him. Broomhead, however, in his evidence, though admitting that he was present, denied having taken any part in the affair.

In the course of the case, one of the jury having examined the fuse, expressed an opinion that it had evidently never been lighted, as there were no traces of fire on it; but

*Pope* (on behalf of the prosecution), in his summing up, said he apprehended it did not at all signify whether the fuse had been lighted or not, and that it was not at all necessary that any explosion should take place in order that this indictment should be sustained, as the offence consisted in the placing or throwing of the explosive material, although no damage whatever should result.

*Torr* (on behalf of the prisoner Jolley) said he should contend that the true interpretation of the section was that the explosive substance must be in a condition to explode and cause damage at the time it was thrown or placed against the building; and that, unless the fuse in this instance had a light applied to it at the

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time it was thrown at Johnson's house, the indictment could not be sustained, as it (the gunpowder) would not otherwise be in a condition to explode and cause damage. He was proceeding to argue that there was no evidence that the fuse had ever been lighted, when

Chief Baron KELLY said he might save himself all further trouble on that point, as he should tell the jury that unless the fuse in the bottle was lighted at the time the bottle was thrown against the house the offence was not made out. "But," his Lordship continued, "I don't say that it is necessary that the light should pass from the fuse to the powder in the bottle and that an explosion should take place. It is enough to constitute the offence if once the light was applied to the fuse before the bottle was thrown, although it might go out before the bottle struck the house and no explosion actually resulted from it." Afterwards, in the course of his summing up to the jury, his Lordship observed that the question was whether the powder, at the time it was thrown against the house, was in a condition to comply with the words of the statute. There were cases in which they could easily suppose it possible for explosive substances to cause damage without the application of a light to them and so would come within the statute. As for instance to thrust a bundle of lucifer matches against a window would complete the offence contemplated by this act of Parliament, because the mere contact would cause them to explode. But if anybody merely threw a bottle containing gunpowder that would not comply with the conditions of the statute. If the fuse was not lighted, it could not cause an explosion, and it would be merely throwing a bottle against a house. The question, therefore, came to be this: Was the fuse ever lighted?

Ultimately the jury found all the prisoners guilty, and they were each sentenced to

*Three months' imprisonment.*

## BAIL COURT.

*November 23, 1868.*

(Before BLACKBURN and HAYES, JJ.)

REG. v. FAWCETT AND OTHERS (Justices of Durham) ;  
*Ex parte* HODSON.

*Vexatious Indictments Act—Refusal of justices to grant summons.*

*If, on application to justices for a summons for an indictable offence, they have heard and determined the application, and, on the merits, have declined to grant it, the court will not grant a mandamus to compel them to review their decision.*

*Secus, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction.*

GREENHOW showed cause against a rule obtained by Keane, Q.C., calling on these justices to show cause why a *mandamus* should not issue, commanding them to hear and determine an information and complaint by one William Hodson, who sought to summon Helen Mitchenson before them to answer a charge of wilful and corrupt perjury. On August 7 Mitchenson laid an information before the justices against Hodson, for an assault committed upon her while in bed in her room in Hodson's father's house. She gave evidence of the offence. Hodson, in reply, called his father, sister, and four other witnesses, but eventually the magistrates convicted and fined him 50s., which he paid. Nothing more was done till October 22, when Hodson applied for a summons against Mitchenson for perjury. The justices heard all the evidence he had to call, and asked him if he had any more. He said no, and the justices then, acting in their discretion, refused to grant the summons. This was a judgment on matters of fact, and entirely within their discretion, which this court will not overrule or review. [BLACKBURN, J.—Then they did not decline, but exercised jurisdiction.] Exactly so. They heard all that the complainant had to say, and ultimately declined to do what he desired. But they had a perfect right to do so.

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11 & 12 Vict. c. 42, s. 9, and *Reg. v. Ingham* (14 Q. B. 396), where the court, under similar circumstances, refused to grant a *mandamus*. [HAYES, J.—Under the Vexatious Indictments Act, the complainant was bound to go before the justices.] It is now only necessary to obtain the leave of the judge at the trial: (30 & 31 Vict. c. 35, s. 1.) [BLACKBURN, J.—*Reg. v. Ingham* is not precisely the same thing, as there the ruling was that the justices might leave the complainant to his remedy before the grand jury. But that was a decision at the hearing of the complaint, and not a refusal to grant a summons.] It is difficult to see why justices are to have a discretion at the hearing and none on the application for a summons. They have been often ordered to grant summonses and warrants respecting rates, because their functions in such cases are merely ministerial. But when they hear an application for a summons of this kind, they are, by the section of the act cited, expressly required to exercise a discretion whether they will grant it or not.

*Keane*, Q.C., in support of the rule.—The justices never heard the case at all, and they do not say that they did. [Affidavits read.] They heard Hodson's evidence, then that of his father, and at first they decided to grant the summons. While their clerk was making it out, he made some sign to them. One of the justices thereupon said, "It would be like trying the case again," apparently thinking that granting it would imply there had been a miscarriage of justice on the former occasion. They then retired to their private room, and on their return they refused the summons, though complainant said he had four other witnesses to call, whom they had not heard. If they were not satisfied with the facts before them, they should have said, "Produce those other witnesses;" but it is not hearing an application to say, first, "We will grant a summons," and then, "We will not grant it, because doing so would be like trying a case over again, which some other justices have heard and decided." The answer is, that the case is admittedly one which requires to be tried again. Evidently there was some squeamishness in dealing with the matter, because it would be like overruling other justices. But if that view is to prevail, it would be impossible ever to convict a person of perjury after that perjury had been successful. [HAYES, J.—They do not refuse on the ground of what themselves had heard, but because of what some other justices had done, after hearing other evidence in another case.] And thereby they refuse jurisdiction under a mistaken view of the law: (*Reg. v. Justices of Cumberland*, 4 A. & E. 695.)

BLACKBURN, J.—I do not decide whether justices are bound to issue a summons, or whether it is an act respecting which they have a discretion; but if they have, they must exercise it on the facts and evidence before them, and if they decline it from a mistaken view of the law, *Reg. v. Justices of Cumberland* shows that a *mandamus* ought to issue. Here they seem to have refused to grant the summons because on different evidence, and in a

different case, other justices had come to a conclusion which they appear to have thought inconsistent with the granting of the summons. If this were to be the rule, no summons for perjury could be issued after the perjury complained of had obtained a verdict, and therefore the rule must be made absolute.

HAYES, J.—I entirely agree. On the case as it stood they were inclined to exercise jurisdiction, but afterwards, from entirely different considerations, they declined it.

*Rule absolute.*

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## COURT OF QUEEN'S BENCH.

(Before Mr. Justice LUSH.)

November 28, 1868.

WHITELEY (app.) v. CHAPPELL (resp.)

*Board of guardians—False personation of a voter—  
14 & 15 Vict. c. 105, s. 3.*

*It is not an offence under sect. 3 of the 14 & 15 Vict. c. 105, to personate a voter who is dead.*

*A. B. was on the rate-book, and entitled to vote for the election of a poor-law guardian, but he died before the election. C. D. filled up the voting paper of A. B. after his death, and delivered it to the proper officer :*

*Held (upon a proper construction of sect. 3 of the 14 & 15 Vict. c. 105), that he did not "personate any person entitled to vote at such election."*

THIS was a case stated by the stipendiary magistrate under the 20 & 21 Vict. c. 43, upon a conviction of the appellant. The case stated was as follows :

At a petty session holden at the New Bailey Court-house, Salford, in and for the division of Manchester, in the county of Lancaster, before me, the undersigned, on the 5th of May, 1868, a complaint preferred by Frederick Chappell, hereinafter called the respondent, against Joshua Whiteley, hereinafter called the appellant, under sect. 3 of the 14 & 15 Vict. c. 106, charging, for that he the said appellant, on the 8th of April, 1868, at the township of Bradford, in the said county of Lancaster, did then and there, pending the election hereinafter mentioned, wilfully, fraudulently, and with intent to affect the result of such election,

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personate one Joseph Marston, a person entitled to vote at the election of guardian of the township of Bradford, in the union of Prestwich in the said county, contrary to the statute in such case made and provided, was heard and determined by me, the said parties respectively being then present by counsel and attorney, and upon such hearing the appellant was convicted before me of personating the above-named voter, and I adjudged him and sentenced him to be imprisoned in the house of correction at Salford, in the said county, for the space of one calendar month. And whereas the appellant being dissatisfied with my determination upon the hearing of the said complaint, as being erroneous in point of law, pursuant to sect. 2 of the said statute (20 & 21 Vict. c. 43), did duly apply on the 7th of May to me in writing to state and sign a case setting forth the facts and grounds of such my determination as aforesaid for the opinion of this court, and did on the 9th of May inst. enter into a recognisance as required by the said statute in that behalf. Now, therefore, I, the said justice, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:—

Upon the hearing of the complaint it was proved on the part of the respondent, and found as a fact, that an election of a guardian for the township of Bradford in the union of Prestwich in the said county of Lancaster, duly took place in the month of April last; that the voting papers were delivered out on the 6th day of the said month of April, and collected on the 8th of the said month by a person duly appointed for that purpose, and that the casting up of the votes took place on the 11th of the said month. It was provided that the said Joseph Marston was on the list of voters duly qualified to vote at the said election. It was also proved on the part of the respondent, and found as a fact, that the voting paper of the said Joseph Marston, as a ratepayer, was duly left by the proper officer at the shop of one Mr. Pendlebury, and by the said Pendlebury delivered to the said appellant. And it was further found as a fact that the voting paper apparently duly signed as if by the said Joseph Marston was delivered by the said appellant to the person duly appointed to collect the said voting papers. It was objected on the part of the appellant, by the counsel who appeared for the appellant, the then defendant, when called on for his defence, that the words of the act of Parliament above mentioned, which enacts that “any person who shall personate any person entitled to vote at such election shall for every such offence, &c.” were not satisfied, because Marston having died in December previous to the election was not a voter at the time of the election, and therefore the defendant did not personate any person who at the time of the election was a voter. The case was decided by me on Tuesday the 5th of May. The demand in writing for a case was made on Thursday the 7th, and the recognisance to prosecute the case was entered into before me on Saturday the 9th: (see 20 & 21 Vict. c. 43, s. 3.) I therefore request the opinion of the court upon these questions:



1. Did the appellant enter into recognisances within the time required by the act of Parliament?

2. Can the appellant be rightly convicted if he votes as and for a person who, if he was alive, would be a voter, but who having died previous to the election, had ceased to be a voter, but who appears on the rate-book?

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Given under my hand this 29th of May, 1868, at Salford, in the county of Lancaster.

HENRY LEIGH TRAFFORD,  
Stipendiary Magistrate for the Division  
of Manchester.

By sect. 3 of the 14 & 15 Vict. c. 105, it is enacted that, if any person pending or after the election of any guardian or guardians shall wilfully, fraudulently, and with intent to affect the result of such election, commit any of the acts following, that is to say, fabricate in whole or in part, alter, deface, destroy, abstract, or purloin any nomination or voting paper used therein, or personate any person entitled to vote at such election, &c., he is to be liable upon conviction to be imprisoned for a period not exceeding three months with or without hard labour.

*Mellish*, Q.C. (*M'Intyre* with him), now appeared for the appellant, and contended that under the words of the section the personation must be of a person entitled to vote, and that as a dead person is not entitled to and cannot vote, so there can be no personation of such a person as entitled to vote. That the section has failed to meet this fraud. That under the 2 Will. 4, c. 53, s. 49, which enacts that if any person shall knowingly and wilfully personate or falsely assume the name or character of any officer or other person entitled or supposed to be entitled to any prize money, &c., it was held that there must be some evidence to show that there was such a person of the name and character assumed, who was entitled or might, *prima facie* at least, be supposed to be entitled to receive the amount: (*Brown's case*, 2 East, P. C. 20.) In the 6 & 7 Vict. c. 18, s. 83 (Parliamentary Registration Act), the words are, "If at any election of a member or members to serve in Parliament for any county, city or borough, any person shall knowingly personate and falsely assume to vote in the name of any other person whose name appears on the register of voters then in force for any such county, city, or borough, whether such other person shall then be living or dead," &c. There the blot in the present case was hit.

*Crompton*, for the respondent, contended that the appellant was properly convicted. The appellant represented that he was entitled to vote. [*LUSH*, J.—That is not the offence; it is falsely personating.] The dead man was on the poor-rate. In the case of *R. v. Martin* (Russ. & Ry. 324), upon stat. 54 Geo. 3, c. 93, s. 89, the indictment charged the prisoner with personating and falsely assuming the name and character of Joshua Boatwright, a seaman entitled to certain prize money, and it was proved that the prisoner applied at Greenwich Hospital for prize money in

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the name of Boatwright, but it appeared that he did not obtain the money, and that Boatwright was then dead. The counsel for the prisoner objected that to personate Boatwright under these circumstances, or to assume his name and character, was not an offence within the meaning of the act, which related only to existing persons; that after the death of Boatwright, he could not be entitled to prize money, but that the personal representatives of next of kin were the persons entitled, and that in fact he was not supposed to be entitled to prize money, since it was supposed at the prize office that he was dead. The prisoner was found guilty, and the point being reserved for the consideration of the Judges, they were of opinion that the conviction was right, and that the statute applied though the seaman personated was dead. *R. v. Crump* (Russ. & Ry. 327) was a similar case. [LUSH, J.—The word “supposed” makes a great distinction in the cases.] The case of *Reg. v. Hague* (9 L. T. Rep. N. S. 648) shows the court will give a latitude of construction in similar cases in order to carry out the objects of the statute.

*Mellish*, Q.C., was heard in reply.

LUSH, J.—I am of opinion that we cannot, without unduly straining the words of the section, confirm this conviction. It is perhaps to be regretted that the Legislature has not used words sufficient to comprehend this case. The words are “personate any person entitled to vote at such election.” Here the man was dead, and so could not be entitled to vote at the election. On that short ground I form my opinion. As regards the two cases cited by Mr. Crompton, I do not think they apply in this case, as they seemed to have turned upon the words “supposed to be dead.”

HANNEN and HAYES, JJ. concurred.

*Conviction quashed.*

## Ireland.

## COURT OF CHANCERY.

June 11, 1868.

(Before the LORD CHANCELLOR.)

*Re* PIGOTT.(a)

*Writ of error—Misdemeanor—Jurisdiction of Lord Chancellor.*

*The granting of a writ of error is part of the prerogative of the Crown. If, therefore, the Attorney-General of England, or the Lord Lieutenant of Ireland refuse to grant it, the Lord Chancellor has no jurisdiction to review that decision.*

THIS was a petition by Richard Pigott, a prisoner under sentence for publishing a seditious libel, that the Lord Chancellor should order the proper officer to issue a writ of error under the Great Seal of Ireland. Mr. Pigott had been convicted of publishing a seditious libel. The sentence was that he should be imprisoned for twelve calendar months, and at or before the expiration of that period should find sureties to be of the peace, and in default of his so doing should be imprisoned for six months more. The prisoner had presented a memorial to the Lord Lieutenant praying that a writ of error might issue. The prayer of this memorial was refused, and the prisoner then presented this petition.

*Butt*, Q.C., *Heron*, Q.C., and *Molloy* were for the prisoner, and argued that the Lord Chancellor had jurisdiction to grant the application, and that there was reasonable cause for the writ.

The *Solicitor-General*, *Ball*, Q.C. and *T. P. Law*, for the Crown.

Amongst other cases, *Ex parte Newton* (16 C. B.), *Reg. v. Prosser* (11 Beav.), *Armstrong's case* (10 St. Tr.), and *Ex parte Lees* (E. B. & E.), were referred to.

The LORD CHANCELLOR said that he did not entertain the least doubt upon the only matter on which he intended to express an opinion. That was the question, Whether he had the power to do that which he was asked to do? It was very singular, that in the whole course of the law no case could be produced in which a

(a) Adapted from the *Irish Law Times*.

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Chancellor was called on to exercise this jurisdiction except the one of *Rowne* in Molloy's Reports. No one pretended that the Chancellor was ever asked, *ex mero motu*, to issue a writ of error in a criminal case. No one ever had recourse to this court before going to the Attorney-General or the Lord Lieutenant. A memorial was always presented to the Lord Lieutenant, who took counsel with the officer who, for a vast number of purposes, filled a judicial position. It was not right to suppose that the Attorney-General was a prosecutor only. He exercised *quasi* judicial functions also, and in no case did he do so more than in reference to his duties as prosecutor, and he knew that for a long period those functions had been carefully and conscientiously exercised in such a way as to form a guard to innocent persons. In a constitution like ours, with a House of Commons all powerful, and a House of Lords to superintend the administration of justice, it was impossible that such an officer should exercise his functions capriciously or maliciously without being made amenable to public justice; but then, on the other hand, it was necessary that such an officer should be left at liberty to perform those functions freely, which he would not be if a motion of this nature could be made, and if an appeal lay from his decision upon a matter on which, on all the authorities, he was to exercise his discretion, and on which in no case had the Chancellor been called upon to do so. There was no pretence for saying that there was any authority save the one in Molloy. As to that, he hesitated to believe that the Lord Chancellor had used the language attributed to him by the reporter. The Lord Chancellor of that day was a great master of the practice of the court; in a less degree he was a master of equity itself; but he had not been three times in his life in a criminal court; while there never, perhaps, was an Attorney-General of such vast experience as the Attorney-General of that day, Mr. Saurin. The argument of Mr. Butt had been that there had been a change in the law at the period of the Revolution, that prior to that there was no distinction in this respect between treason and felony on the one hand, and misdemeanor on the other, and that in all alike the granting of a writ of error depended on the sanction of the Crown, but that since the Revolution, in case of misdemeanor, the subject could claim the writ as matter of right *ex debito justitiæ*; and then Mr. Butt rightly, if his premises were true, went on to argue that if there is an absolute right there must also be a remedy. Well, he did not know by what process it was that the law was stated to have been changed at the Revolution. No doubt the times preceding that event had been what are called bad times, and one of the first things which care was taken to do after it was to remedy the injustice which in many cases had been done to individuals; but still the precedents which followed were for a long period those of unsettled times, when a great deal was often done according to the particular party which happened for the moment to be in power.

He was unwilling, in settled times, to follow them. All the modern cases were against the idea that the courts could interfere with the discretion of the Attorney-General; and those cases were decided by such men as Lord Romilly, Jervis, C. J., and Lord Campbell—men by no means likely to stretch the prerogative against the rights of the subject. They all laid down the law exactly as it was laid down in Blackstone. That plainly made the granting of the writ a part of the prerogative of the Sovereign, which in Ireland was entrusted to the Lord Lieutenant. He had no jurisdiction to do what was sought of him. In putting the seal to writs of error he did not act judicially. He never inquired into the merits; what he did was only ministerial. On the whole, he could only act in the way laid down by the highest authorities, and must say “No rule.”

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## NORTHERN CIRCUIT.

*Manchester, March 17, 1869.*

(Before Mr. Justice BRETT.)

REG. v. WOLSTENHOLME. (a)

*Embezzlement—Secretary of company.*

*To support a charge of embezzlement against the secretary of a company, whose duty it was to receive moneys and pay wages, &c. out of the said moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money.*

THE prisoner, John Wolstenholme, was charged with embezzling various sums of money whilst in the service of the Heywood Waterworks as secretary.

The first count charged him with embezzling 403*l.* 10*s.* 11*d.* of the Heywood Waterworks Company, and in the second count he was charged with embezzling 3*l.* 19*s.* 4*d.*, the proceeds of a post-office order.

*Addison* for the prosecution.

*Torr* for the defence.

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

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The Heywood Waterworks Company was under the government of a board of directors, and the prisoner was general manager, cashier, and secretary; he had a salary of about 155*l.* net per annum. It was his duty with the surplus he had to pay moneys into the bank; before he, however, paid such surplus, he had to pay a certain sum to each of the directors, wages to certain servants of the company, and his own salary also; in fact, all the money or receipts of the company passed through his hands. In December, 1868, the balance in hand was ascertained by the auditor to be about 400*l.*, which was considered a large one, and was supposed to be in the safe or cash box, and was returned by the auditor as being in the prisoner's custody. The prisoner had the sole charge of the key, and no one had any business with the safe or its moneys but the prisoner. The chairman of the directors, not having ascertained at that time that there was a balance of nearly 400*l.*, went to the prisoner's house in December, 1868, where the cash box was kept, and inspected the prisoner's cash book, which showed a balance of 226*l.* He was then asked whether that sum was in the safe, he said it was, and that it was in small parcels of silver. Some little time after this the suspicion of the chairman being aroused, he asked the prisoner for the key of the safe; he made an excuse, saying that he had private papers there. Eventually, however, he gave up the key, and there was only found to be 1*l.* 10*s.* in the safe, together with a guarantee and a policy of assurance.

BRETT, J.—I suppose this balance would consist of small amounts collected from time to time?

Addison.—My case is that the prisoner was not entitled to take a penny out of the office without accounting for it.

BRETT, J.—Yes, he had; he had to pay wages, the directors' allowances, and his own salary.

Addison.—Everything not entered in the book ought to have been safe in the cash box; the prisoner had no right to take away anything without accounting for it.

BRETT, J.—No doubt a servant authorised to receive money is bound to account for it; it was the duty of the prosecution to bring forward three cases of the kind which had happened in six months, and no more. Here, doubtless, there is evidence that he refused to account for something, but on which case do you rely? how can you point out a particular case? how can it be said that the prisoner did not pay the very sum he is charged with embezzling for wages, his own salary, or that of the directors? Embezzlement is a compound offence; the mere fact of entering in the book is not accounting, neither is the mere fact of omitting to enter in a book not accounting. Suppose a man entered everything right, and took the money and used it, that was not accounting. If he did not enter anything in the book, and yet handed over the money, it was accounting. You must show that he received certain amounts; that it was his duty to account for them; that he did not do so.



*Addison*.—In this case the prisoner had not accounted for this money, and the prosecution might take any one of the accounts he had received, and say he had not paid it over, for there was so much short ; it cannot be proved that he appropriated a specific sum, but only that he appropriated generally sums of money.

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BRETT, J.—All you can prove is, that he has not properly accounted for the balance, and that will not do. *Embezzlement.*

The learned Judge then directed the jury to return a verdict of *Not guilty* on the first count.

The prisoner was then charged with embezzling 3*l.* 19*s.* 4*d.*, the proceeds of a post-office order received by him on behalf of the company, and for which he had not accounted.

This was the subject of the second count in the indictment.

The learned Judge, however, said that the mere fact of his not entering this sum in his book was not non-accounting for it, although it might be evidence of it.

*Addison*.—Non-entry of this sum is evidence of a specific appropriation.

BRETT, J.—I cannot say there is no evidence of it. You say he has not entered it in his books, but how do you know that he has not paid it over ? You must show that it was the prisoner's duty to pay over every sum he received, and that he paid it away improperly. The directors have their civil remedy. This is not the case of a simple servant who was bound to pay over money, but a trusted agent who received money and paid money, and had to account for the balance. The criminal charge against the prisoner cannot be sustained.

The jury, by his Lordship's direction, returned a verdict of

*Not guilty.*

## NORTHERN CIRCUIT.

## MANCHESTER ASSIZES.

*March 15, 1869.*

(Before Mr. Justice BRETT.)

REG. v. BERNADOTTI AND OTHERS. (a)

*Evidence—Dying declaration—"Be quick, or I shall die"—  
Deceased not sworn before making declaration.*

*A considerable length of time between making statement and time  
of death does not render statement inadmissible.*

*On a trial for murder, a written declaration of the deceased was put  
in evidence by the prosecution; the declaration was made before  
a magistrate. The deceased said, "Be quick, or I shall die,"  
but did not die for nearly three weeks. Deceased was not sworn  
before making the declaration:*

*Held, that the declaration was admissible, for the deceased thought  
he was going to die, and the fact that he did not die for nearly  
three weeks would not render it inadmissible. It is not abso-  
lutely necessary that deceased should have been sworn.*

**J**OHAN BERNADOTTI, Bartholomew Galgani, and Joseph  
Beston were charged with the wilful murder of John Oldham  
at Ancoats, on the 31st of January last.

*Hopwood (Grimshaw with him) for the prosecution.*

*Torr (Cottingham with him) for the defence.*

From the evidence, it appeared that the deceased, in company  
with other men with whom he had been drinking, were going home  
together, when they met the three prisoners. A quarrel took  
place, knives were drawn, and the deceased received a wound in  
the neck, which eventually caused his death.

The deceased was then taken to the infirmary, and was there  
attended to by the house surgeon, Mr Pinder, from whose  
evidence it appeared that the deceased was exceedingly faint from  
loss of blood, principally from a punctured wound on the left side

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

of the neck, an inch below the angle of the jaw. It was three inches deep, and three-quarters of an inch long. It had been done, in his opinion, with some sharp instrument. The bleeding had ceased when the man was admitted, and witness did not think it necessary to tie the artery. The bleeding, however, recommenced in a quarter of an hour, and witness thereupon, thinking that the deceased was in danger, although not in immediate danger, sent for a magistrate to receive his dying declaration.

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Before making the declaration, deceased said, "Be quick, or I shall die." He was not, however, sworn when he made the declaration. He did not die for nearly three weeks.

*Hopwood* then proposed to read the deposition of the wounded man as a dying declaration.

*Cottingham* objected to the deposition being read, and contended that the learned judge could not admit it as evidence, unless he was convinced, beyond doubt, that the impression upon the mind of the deceased was not merely that he should die, but that dissolution was imminent and impending. To support this, he quoted a case of *Reg. v. Woodcock* (1 Leach C. C. 500, 502); also the case of *Rex v. Crockett* (4 C. & P. 544). He also contended that the feeling must continue to the time of death, and that this was not the case with the deceased, who rallied afterwards, and therefore must have had hope of life. In every case in which a deposition was received as a dying declaration, death had invariably taken place within a few hours or days. In this case, however, there was a space of nearly three weeks between the time of the making of the declaration and the actual death of the deceased. This very fact would go far to prove that the deceased did not think himself beyond hope of recovery, or in imminent danger.

*Hopwood* said that each case must be taken separately, inasmuch as the circumstances in each differed so materially; some judges required more proof in these cases than others. It was, of course, essential to the admissibility of a declaration of this kind that it should be made under a sense of impending death. The deceased here said, "Be quick, or I shall die." He, therefore, considered death imminent; and the fact that he did not actually die for nearly three weeks ought not to be considered as evidence of the state of his mind.

BRETT, J., said that it was a case of considerable importance, and he would, therefore, consult Mr. Justice Lush. This he did, and on his return into court gave the following judgment. I am of opinion that this statement is admissible. I take the law to be that two facts must concur; first, that the deceased was at the time of the making of the statement in such a condition that his death was imminent and impending, and that he was in danger of dying in a short time without hope of recovery. If these two circumstances are proved, I think the statement is admissible. It is not necessary to decide the point whether the statement would have been rendered inadmissible by the fact that

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tion.*

the deceased after having made the declaration had himself hopes of recovery, for no evidence has been given that any such hope was revived. The fact of his living so long would have been important if there had been any doubt as to his actual danger, but the mere fact of his lingering on would not do away with the strong conclusive evidence as to his state at the time. He refused to reserve the point, inasmuch as he said he had been fortified in his own opinion by that of Mr. Justice Lush. As to the point whether the deceased should have been sworn before making the statement, he said: I am of opinion that the statement is not put in as a deposition, but only as a dying statement, and it was not necessary to swear the deceased as the law considers that, if a man believes himself dying, it is equal to the solemnity of taking an oath.

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## NORTHERN CIRCUIT.

### MANCHESTER SUMMER ASSIZES.

August 10, 1869.

(Before Mr. Justice HAYES.)

REG. v. STANCLIFFE.(a)

*Restitution of stolen goods—24 & 25 Vict. c. 96, s. 100—  
False pretences.*

*The 100th section of 24 & 25 Vict. c. 96 applies to cases of false pretences as well as felony; and the fact that the prisoner parted with the goods to a bonâ fide pawnee will not disentitle the original owner to the restitution of the goods.*

**T**HOMAS STANCLIFFE was convicted of having obtained goods by false pretences from Frederick Hudson.

Kay, Q.C. (Coventry with him) for the prosecution.

Torr for the defence.

From the evidence it appeared that the prisoner went to Mr. Hudson and represented himself as manager of the Oldham Mill Road Company, and obtained goods from him to the amount of

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

300l.; the prisoner then took the goods to a pawnbroker named Davis, and obtained from Davis large advances on them, and gave Davis authority to sell the goods, which were in Davis's possession, in case he, the prisoner, was unable to repay the money advanced on the goods.

The goods at the time the prisoner was convicted were in the possession of Davis.

There was no pretence that the goods came into the possession of Davis otherwise than *bonâ fide* for value; Davis was called as a witness.

Kay, Q.C., on behalf of Hudson, the prosecutor, applied to the learned judge for an order, under 24 & 25 Vict. c. 96, s. 100, for the restitution of the property then in possession of Davis to Hudson.

After some discussion, his Lordship said, that before he made such an order, it would be right that Davis should appear by counsel to show cause why an order should not be made.

The summons was heard by the learned judge in his private room.

Jordan, for Davis, argued that there was no precedent for such an order where goods were obtained by false pretences; all cases in which an order for the restitution of goods had been made were cases of felony; and where goods were obtained by false pretences, the property passed; it was not so in felony. To support this he cited *White v. Garden* (10 C. B. 919).

Kay, Q.C. (with him Coventry), for the prosecutor Hudson, argued that the statute, by sect. 100, revests property in goods to the original owner on conviction, and that there was no difference between a case of felony and the case of goods obtained by false pretences; that it was clearly the intention of the Legislature to provide for the restitution of stolen goods to their proper and original owner; even where the stolen property was sold in market overt, it had been held that it should be restored to the proper owner. He cited *Howard v. Smith* (T. R. 750), and *Scattergood v. Silvester* (15 Q. B. 506).

HAYES, J. (after consulting with Hannen, J.) said, that it was a simple question of the meaning of the statute. Here the conviction had been obtained by the person who was originally the owner of the goods, and the question was whether the fact that the prisoner had parted with the possession of them to a *bonâ fide* pawnee had disentitled the original owner to a restitution of the goods? He was of opinion that it had not, but the prosecutor Hudson, the original owner, was entitled to restitution. Now, it would appear, from the cases of *Scattergood v. Silvester*, and *Howard v. Smith*, that even where stolen property was parted with by the thief in market overt, the property was revested in the original owner on conviction. In such cases the ownership was transferred quite as effectually by the sale in market overt as could be done by the sale or pawn of goods obtained by false pretences; the cases are therefore quite analo-

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v.  
STANCLIFFE.

1869.

Restitution of  
stolen goods.

REG.  
v.  
STANCLIFFE.

1869.

*Restitution of  
stolen goods.*

gous. The statute revested the property in the goods in the original owner, and he was therefore entitled to his order.

*Order made.*

In the case of *Reg. v. Ford*, at the same assizes, a similar application was made, but was refused by Hayes, J., on the ground that the person who had bought the goods from Ford, and on whom the order would have to be made, had not been called as a witness.

## NORTHERN CIRCUIT.

LIVERPOOL SUMMER ASSIZES.

August 16, 1869.

(Before Mr. Justice HANNEN.)

REG. v. HOWIE. (a)

*Forgery—Promissory note—Seaman's advance note.*

*Prisoner forged a seaman's advance note. He was indicted for forging or uttering a certain promissory note or order for the payment of money :*

*Held, that a seaman's advance note was not a promissory note or order for payment of money, and that the indictment was therefore bad.*

**J**AMES ALFRED HOWIE was indicted for having at Liverpool, on the 21st of June last, feloniously forged and uttered a certain promissory or order for payment of 4*l.*, with intent to defraud.

*Fletcher* for the prosecution.

*Cottingham* for the defence.

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.



The instrument which the prisoner was charged with having forged was a seaman's advance note.

The following is a copy of it :

" B. £4 0 0.

" Agreement made at Liverpool this 16th day  
of June, 1869.

" Ten days after the ship *Candidate* sails from the port of Liverpool the undersigned do hereby promise and agree to pay to any person who shall advance four pounds to J. A. Howie on this agreement the sum of four pounds, provided the said J. A. Howie shall sail in the said ship from the said port of Liverpool.

(Signed) " J. H. ISMAY & Co.  
" H. PALMER, Master.

" Payable at 10, Water-street, Liverpool."

The note was indorsed on the back with the signature " James Howie."

On the 21st of June the prisoner presented the note to Mr. Taylor, a publican residing in Liverpool, whom he had previously known, and informed him that he was engaged as third steward on board the *Halton Towers*, a vessel belonging to Messrs. Ismay and Co., of Liverpool. The prisoner then asked Mr. Taylor to advance him 3*l.* on the note, which he produced. Having examined the note, and seeing that it purported to be signed by Messrs. Ismay and Co., and thinking the signature genuine, Mr. Taylor advanced 3*l.* to the prisoner.

Evidence was produced which proved that the signature had not been written on the advance note by Messrs. Ismay and Co., or by anyone in their employment, or who had authority to do so.

*Cottingham* objected that the indictment was bad. It charged the prisoner with having forged a certain promissory note or order for the payment of money. Now the advance note was neither a promissory note nor an order for the payment of money, but it was an agreement to pay a certain sum of money under certain conditions, and, unless those conditions were fulfilled, the advance note was useless. With a promissory note there was no condition; neither was there any condition in an order for payment of money, as in a cheque. The indictment was, therefore, clearly bad.

HANNEN, J.—I am of opinion that the objection is a good one. An advance note being an agreement to pay under certain conditions removes it from the class of promissory notes or cheques, which are peremptory orders to pay, without any condition affixed to them. Under these circumstances I am of opinion that the objection taken by Mr. Cottingham is fatal to the prosecution, and the indictment must be quashed. I shall, however, order another one to be preferred.

*Indictment quashed.*

REG.  
v.  
HOWIE.  
—  
1869.  
—  
*Forgery*

## NORTHERN CIRCUIT.

LIVERPOOL SUMMER ASSIZES.

August 13, 1869.

(Before Mr. Justice HANNEN.)

REG. v. CARROL.(a)

*Evidence—Depositions signed by magistrate—Signature on last page only—11 & 12 Vict. c. 42, s. 17.*

*Where the deposition of a deceased person is on separate sheets it is not necessary that the magistrate before whom such deposition is taken should sign his name on each separate sheet, but it is sufficient that the magistrate should sign his name on the last sheet.*

**M**ICHAEL CARROL was indicted for the manslaughter of Samuel Kingsberry at Liverpool on the 6th of June last.

*Potter* for the prosecution.

*Cummins* for the prisoner.

Previous to the evidence being gone into, the deposition of the deceased taken before the magistrate was put in to be read.

*Cummins* objected to its being read, on the ground that the magistrate's signature, before whom the deposition was taken, appeared on the last page sheet only, and not on each separate sheet as required by the act (11 & 12 Vict. c. 42, s. 17).

*Potter.*—The deposition was taken in the usual way, and it never could have been the intention of the act of Parliament that each separate sheet should have the magistrate's signature upon it. The act of Parliament (11 & 12 Vict. c. 42, s. 17) says, "If such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in prosecution." There is no mention of separate sheets being signed separately; besides, they cannot be taken to be entirely separate, for they are fastened together at the top, and are therefore to be read as one deposition. If it was necessary that the magistrate's signature should

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

appear on each separate sheet, the deposition would then become several depositions, and not one. The prisoner has had also every opportunity of cross-examining, as required by sect. 17. The evidence is, therefore, clearly admissible.

HANNEN, J.—There is nothing in the statute which requires that a deposition should be signed by the magistrate at the foot of each page. I do not know whether it is usual to do so, but it is not required by the statute. The only use of the signature at the foot of each page would be to show that each page was part of the original document. As it is, therefore, signed by the magistrate on the last page, I take that to be sufficient.

*Guilty.*

REG.  
v.  
CARROL.  
—  
1869.  
—  
*Evidence—  
Depositions.*

## CENTRAL CRIMINAL COURT.

JANUARY SESSIONS, 1869.

(Before Mr. Justice KEATING.)

REG. v. CAMPBELL. (a)

*Murder—Shooting—Intent to kill—Evidence.*

*Where a person fires at another a firearm knowing it to be loaded, and therefore intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and if in such case the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is manslaughter.*

THE prisoner was indicted for the murder of John Moir. He was also arraigned on the coroner's inquisition for manslaughter. That is, the first count stated that he of "malice aforethought feloniously did kill and murder;" the other, that he feloniously did kill.

*G. S. Griffiths and H. T. Hunt for the prosecution.*

*Digby Seymour and Macdonald for the defence.*

The prisoner lodged with the mother of the deceased, who also with his brother lived in the same house. They all dined together on Christmas-day with some friends. The prisoner was noisy and obnoxious; and some trifling circumstances were proved which might have led to some quarrel, but it did not appear that

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

REG.  
v.  
CAMPBELL.  
—  
1869.  
—  
*Murder.*

they had. Not long afterwards they went upstairs together to the room of the deceased. The prisoner asked deceased to wrestle with him, but he refused. The prisoner took up a rifle which was in the room, and was kept unloaded, and went into an adjoining room where ammunition was kept. In a few moments he came back into the room and pointed the rifle towards the deceased. Being asked what he was going to do, he said "I am going to put out the light." The rifle, however, was held above the glass of the lamp, and levelled at the deceased. The prisoner fired at and shot him through the head, killing him on the spot. The brother came up, and, asking what he had done, the prisoner said, "I liked Jack, and don't mind swinging for him!" And to another he said, "It is done now, and can't be helped—I can only swing for him." A bullet was found in the wall of the room where the gun was fired, and also a rifle stopper, and the stopper was found in the wound, when it was inferred that it was fired with the stopper on. And it was suggested on the part of the defence that the prisoner must have fired it pulling the trigger, and not thinking or not knowing that it was loaded. But, on the other hand, there was evidence that the rifle was kept unloaded, and that he knew that the ammunition was kept in the next room, and that he was absent long enough to load it; and it did not appear that he said anything to show that he had pulled the trigger under the impression that the gun was unloaded.

KEATING, J., to the jury. — The question is reduced to this, Whether you are satisfied that the prisoner fired the gun knowing it to be loaded, intending to kill or to do grievous bodily harm? If he fired it at the deceased, or anyone, knowing it to be loaded, the intent is to be presumed, and from the intention to kill the malice aforethought is implied in law. If you are satisfied the prisoner did *not* know the gun was loaded, then he cannot be convicted of murder, and the question will be one of manslaughter. As to that, I direct you that, if a man take a gun, not knowing whether it is loaded or unloaded, and using no means to ascertain, and fires it in the direction of any other person, and death ensues, he is guilty of manslaughter.

*Guilty of manslaughter.*

## CENTRAL CRIMINAL COURT.

JANUARY SESSIONS, 1869.

(Before Mr. Justice LUSH.)

REG. v. SHEPHERD AND OTHERS. (a)

*Conspiracy—6 Geo. 4, c. 129, and 22 Vict. c. 34—Conspiracy to force workmen to leave their employment.*

*On an indictment under 6 Geo. 4, c. 129, s. 3, for conspiracy to force workmen to leave their employment, the evidence being that the defendants merely waited outside the place where the workmen were employed, and tried to induce them not to work there, and that their conduct was civil and peaceable :*

*Held, that the question was, whether they had endeavoured to control the free action or overcome the free will of the workmen by force or intimidation. If there had been merely persuasion, no matter what the consequence of it was, peaceable and unaccompanied by menace or violence, this would not render the defendants amenable to criminal justice on such a charge, they being then protected by 22 Vict. c. 34.*

**I**NDICTMENT under the 6 Geo. 4, c. 129, s. 3, for conspiracy (b) to force workmen to leave their employment, and stated in

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

(b) The act of 6 Geo. 4, c. 129, s. 3, which provided that if any person should "by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business to depart from his hiring, employment, or work, or prevent or endeavour to prevent, any journeyman, not being hired or employed, from hiring himself to, or from accepting work from, any person or persons, or shall molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or of his refusing to comply with any rules made to obtain an advance or reduce the rates of wages, or to lessen or alter the hours of working; or if any person shall by violence, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, he shall be imprisoned for three months." A subsequent act (22 Vict. c. 34) enacted that "no workman or other person, by reason merely of his entering into an agreement with any workman, or by reason merely of his endeavouring peaceably, and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, shall be deemed or taken to be guilty of "molestation" or "obstruction" within the meaning of the said act of 6 Geo. 4."

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SHEPHERD.  
—  
1869.  
—  
Conspiracy.

various counts, that Benjamin Shepherd, Joseph Brayne, Alfred Cook, William Emmett, sen., and William Emmett, jun., had by threats, intimidation, and molestation, endeavoured to force various journeymen, hired and employed, to depart from their hiring and employment, and had by threats, intimidation, and molestation, endeavoured to prevent various journeymen not being hired from hiring themselves, and being employed *contra formam statuti*.

*F. H. Lewis* and *Besley* were for the prosecution.

*Parry*, Serjt., and *Bronsby* were for the defendants.

The prosecutor carried on business as a manufacturer of shoes, and employed 120 men. Some of his workpeople were in the habit of taking materials, and making the goods at their own homes. In November, a misunderstanding arose respecting prices of labour, and a number of persons left his service. They gave no decided reason why they left, but simply returned their work—some of them bringing it back in a finished and others in an unfinished condition. Witness had suggested an arbitration, but the elder Emmett said he was afraid he could not bring that about, and the suggestion was not adopted. After the men left, the defendants began walking up and down in front of his premises, stopping persons who were applying for work, as well as those who took work away. They were not generally in company, but two or three of them walked the street at a time. The men were mistaken as to a reduction being made in the prices, and he endeavoured to satisfy their minds that, on the contrary, there had actually been an advance.

A policeman said he was employed to watch the defendants, and saw them at times opposite Mr. Glew's shop, stopping persons going in and coming out. He once heard Shepherd tell a child he had no business to carry the work away, as the shop was on strike. Another officer said the prisoners Cook and Brayne were taken into custody on suspicion of being in the street for an unlawful purpose; and, on their refusing to give their names and addresses, they were removed to the police station. They then stated they were employed by Emmett to watch Mr. Glew's shop, and after a time they were liberated.

A porter, in the employ of the prosecutor, said he was stopped when leaving his master's premises, and he was told not to go there for work. Several workmen gave similar testimony, admitting, however, that the defendants were civil, and their demeanour perfectly respectable.

*Parry*, Serjt. (at the close of the case), submitted there was no case to go to the jury, and that the defendants had not by their conduct brought themselves within the law. They had not conducted themselves violently, nor used threats or intimidation of any kind, but had merely spoken to their fellow workmen with a view to persuade them to cease work, as they had a perfect right to do.

*Lewis*, *F. H.*, relied on *Reg. v. Drutt* (10 Cox Crim. Cas.



592), as showing that, if any set of men agreed among themselves to coerce liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence—namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. The learned judge explained that coercion or compulsion meant something that was unpleasant and annoying to the mind, and he laid it down as clear and undoubted law that if two or more persons agreed that they would by such means co-operate together against the liberty of the individual, they would be guilty of an indictable offence. It was clear by other portions of that judgment that the system of picketing was illegal, so that the defendants in this case had no right to stand all day about their master's shop addressing their fellow workmen with such words as, "You know this shop is on strike; you have no right to take work away, and you are injuring our society."

LUSH, J., said if the defendants had known the addresses of the men they might have gone round to them to persuade them from working, and this would have been perfectly legal. The question in the case was, Whether they had done wrong by waiting for them in the street? To bring them within the terms of the act of 22 Vict., there must have been threats or molestations otherwise than by endeavouring peaceably and in a reasonable manner to persuade others to cease or abstain from work. In a similar case tried before him at Leeds, he remembered telling the jury that the defendants had a perfect right to persuade, and that in order to do so they must have access to the persons whom they wished to persuade. If they did that in a peaceable manner, their conduct would be lawful. In the case cited the parties charged were guilty of conduct such as any reasonable person would call intimidation. They abused their fellow workmen, shouted and hooted at them, and were otherwise violent in their conduct. He agreed entirely with what Baron Bramwell had said; but the question was whether it applied to the present case. It was very important that the law should be settled in regard to these matters. The better way would be to take the opinion of the jury on the case, and reserve the question for the Court of Criminal Appeal. In summing up, the learned judge said the defendants were charged with conspiring together to do an unlawful act. The act stated that if violence was used, either to persons or property, or threats, intimidation, molestation, or obstruction, then the persons offending brought themselves within the terms of the law. In this case the question which they would have to decide was, whether the defendants did endeavour to control the free agency, or overcome the free will, of their fellow workmen by force or intimidation; and, if so, they would be guilty of the offence imputed to them; but if there had been merely persuasion, no matter what the consequences were, then it would not be at all an unlawful act.

*Acquitted.*

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v.  
SHEPHERD.  
—  
1869.  
—  
*Conspiracy.*

## HOME CIRCUIT.

SURREY SPRING ASSIZES, 1869.

(Before Mr. Justice BYLES.)

REG. v. WILLIAMSON. (a)

*False pretences—Misrepresentation as to value of business.**A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretences.**On an indictment for obtaining money by false pretences, it appeared that the prisoner, on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt : Held, that the indictment could not be sustained upon either of the representations.*

**I**NDICTMENT for obtaining money from one S. by means of false pretences laid being, (1) that the prisoner was then doing a good business ; (2) that he said that he had sold a good business for 300*l.* ; (3) that it was necessary for his safety, if he engaged S. as his assistant, that he should have from him a deposit of 50*l.*

There was a second indictment charging that the prisoner obtained money from one W., by falsely pretending, (1) that he was then doing a business with returns of 100*l.* a week ; (2) that he had sold a business for 300*l.*

*Lilley* for the prosecution.

*Oppenheim* for the prisoner.

On the first indictment the prosecutor, S., who had been engaged by the prisoner as assistant, was called to prove the representations, and to show that upon the faith of the representation he entered into an engagement with the prisoner for a small salary and half profits, and also deposited 50*l.* as a security, whereas in truth the business was worthless, and the prisoner a bankrupt. He stated that he had deposited the money in the belief that the prisoner " had a good business."

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

BYLES, J. (to the counsel for the prosecution).—On which of the pretences do you rely? It is like the case of a sale of a business with exaggerated representations of its value, upon which, though fraudulent, an *indictment* will not lie.

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—  
1869.

*Lilley* said he relied on the prisoner's representations that he was doing a good business, and that he had sold a business for 300*l*.

*False pretences.*

BYLES, J.—The latter is too remote. You might as well go back to any former transaction of which he had given a representation—that is too remote. As to the other, have you any case in which it has been held that on the sale of a business—the vendor saying it was a good business—he has been thus indicted? (No such case was cited.) (a) This appears to be rather matter for an action for false representation than for a criminal prosecution.

*Lilley* urged that here the pretence was more entirely false than in any previous case, for the man was a bankrupt.

BYLES J.—There is no pretence laid that he was *not* a bankrupt. The pretence laid is that he had a good business. It is like the case of a sale of a business upon such a representation. No doubt, if the business was worthless, there was a gross exaggeration, probably fraudulent; but is it a case for an indictment for obtaining money by means of false pretences? If so, an indictment would lie in every case of a false and fraudulent representation of the value of a business. Unless some authority to the contrary can be cited, I must rule against the prosecutor.

No case being cited,

BYLES, J. directed the jury to acquit the prisoner, on the ground that such a representation, although grossly fraudulent, was not the subject of a criminal proceeding.

*Not guilty.*

No evidence was offered on the other indictment.

(a) And see *Reg. v. Watson* (20 L. J. 18, M. C.), *contra*.

## HOME CIRCUIT.

KENT SUMMER ASSIZES, 1869.

(Before KELLY, C.B.)

REG. v. ATKINSON AND OTHERS.(a)

*Riot—Evidence of liability for.*

*On an indictment for riot, persons are not liable merely on account of their having been present and among the mob, even although they had the power of preventing it, unless they by word or act helped, incited, or encouraged it.*

*In such a case, the riot arising out of an election, the evidence against the principal defendant was that he took a strong interest in the election, and was present when there was a serious riot and a systematic attack upon the houses of the opposite party, and finally upon the polling booths; that many of the rioters were in his own employment; that he did nothing to restrain them, and that when asked to do so he only laughed:*

*Held, that there was no evidence against him, nor against any others who were present, except such as were proved by word or act to have taken part in, helped, or incited to the riotous proceedings.*

**I**NDICTMENT against Atkins, Bevan, and twelve other persons for riot. It stated that the defendants and divers other evil-disposed persons, to the jurors unknown, at Northfleet, unlawfully, riotously, and tumultuously did assemble together to the disturbance of the public peace; and, being so assembled, did unlawfully and with force injure the dwelling place of one Wood, *contra formam statuti et contra pacem*.

Thirteen other counts, each charging as before, that the defendants injured the house of some other person.

*Fifteenth count.*—That the defendants, with divers other ill-disposed persons being there armed with sticks, staves, and other offensive weapons, did unlawfully, riotously, and continuously make a great noise, riot, and disturbance, for a long time, to the great disturbance and terror of the liege subjects of the Queen—*contra pacem*.

The defendants pleaded not guilty.

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

The bill had been found by the grand jury of Kent, and had been removed into the Queen's Bench by *certiorari*, and now came down for trial.

*Hawkins, Ballantine, Serjt., Barrow, and Rosher*, for the prosecution.

*Denman and Poland* were for Bevan, the principal defendant.

*Parry, Serjt., Sleigh, Serjt., and J. C. Mathen*, for the other defendants.

This was a prosecution for riot, on the occasion of the first election for the new parliamentary boroughs of Gravesend, comprising Gravesend, Milton, and Northfleet. On the day of the election (17th of November, 1868), about nine o'clock in the morning, the Conservative candidate was in a majority of ninety, and upon this becoming known at Northfleet two bands of music from Greenhithe and Gravesend, which had been playing about the neighbourhood all the morning, with banners, united together, and, at the head of a large mob, proceeded through the town. The mob as they went threw volleys of stones and brickbats at the houses known to belong to the supporters of the Conservative candidate, and broke the windows. Some of the brickbats which had been thrown and picked up were produced, and were large enough to kill any person who might have been struck by them. These outrages were all committed on the houses of Conservative voters, and were therefore clearly the result of some concerted plan of action on the part of their opponents. In the end the polling booth at Northfleet was beset, and ultimately destroyed. Early in the case it became, as the Lord Chief Baron observed, abundantly established that there had been a serious riot, and the only question was as to the liability of the different defendants, and especially of the principal defendant Bevan. As to him the evidence appeared to be this: that he took a prominent part at the election as one of the supporters of the Liberal party; that he was the employer of some hundreds of men at a lime factory at Northfleet; that many of the rioters were men in his employment, who had leave for the day from the factory; that he was at the poll booths at Northfleet when the mob "packed" the approaches so closely that no persons could vote against the Liberals; that many of those who thus "packed" the approaches were men in his employment; that he was there in the morning; that he made no efforts to induce them to leave; and that when asked to do so he only laughed. It being admitted that this was all the evidence against him,

KELLY, C.B., ruled that the evidence was not sufficient against him, and directed his acquittal. It might be, he said, that the defendant had the power of using his influence among the men in his employment to prevent them from continuing this riotous proceeding, and that he did not endeavour to do so. But, even if there were good ground for believing that he might have prevented these proceedings, he was not on that account responsible for them. Whatever suspicion might arise that he might have

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put a stop to these outrages, there was not sufficient evidence to render him criminally liable for them, and he must therefore be acquitted.

A verdict of not guilty was accordingly entered.

The case proceeded against the other defendants, and, as regarded five of them, there was evidence that they had committed acts of violence—that is, that they had thrown stones, or helped to hustle voters, and obstruct the police; but, as regarded the rest of them, there was no further evidence than that they had been present.

At the close of the case for the prosecution,

*Sleigh*, Serjt., submitted that there was no evidence of a riot.

KELLY, C.B., however, thought that there was ample evidence of it, as there was abundant proof that a large number of persons had paraded the streets for a common purpose—that of attacking the houses of persons of a particular political party, in the course of pursuing which purpose they had put the Queen's subjects in bodily fear, and had actually done great injury.

Evidence was then gone into for the defence, previous to which, however,

KELLY, C.B., ruled that there was no evidence except as regarded the five defendants, against whom acts were placed, and therefore directed the acquittal of the others.

KELLY, C.B., in summing up the case to the jury, said the defendants stood indicted for having riotously and tumultuously assembled together for an unlawful purpose on the day of the election. The only question was as to the liability of the defendants, for there could be no doubt that there had been a riot, and a very serious riot. There could be no difficulty in determining that a riot really was committed when a large number of persons went about destroying or attacking the houses of persons of a particular party. The question was whether these five defendants were parties to the riot. He had already ruled as regarded the principal defendant that the mere presence of a person among the riotors, even though he possessed the power and failed to exercise it of stopping the riot, did not render him liable on such a charge; and the question was whether, as regarded these five defendants, there was sufficient evidence that they were assembled for an unlawful purpose. One description of unlawful purpose would undoubtedly be the preventing voters of a particular party from coming to the poll and recording their votes; and if the jury were satisfied that any number of persons (above three), and among them the defendants or any of them, were assembled with that purpose, and in the prosecution of that purpose committed any acts of annoyance on the voters, such persons would undoubtedly be guilty. So, if the defendants, or any of them being assembled for that purpose, had, as alleged, thrown stones at any of the houses, they would be guilty upon this indictment; and so as to any who obstructed or assaulted the officers in the discharge of their duty. If the jury therefore



thought there had been an assaulting of a number of persons for the unlawful purpose of preventing the officers from doing their duty, and that the defendants, or any of them, assisted and encouraged others in surrounding and obstructing the officers, such persons also would be guilty upon this indictment. But in order to find any of the defendants guilty, the jury must be satisfied that they had taken part in an assembly for an unlawful purpose, and had helped or encouraged or incited the others in the prosecution of that purpose.

The jury returned a general verdict of

*Not guilty.*

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v.  
ATKINSON.  
—  
1869.  
—  
Riot.

## CENTRAL CRIMINAL COURT.

OCTOBER SESSIONS, 1869.

(Before Mr. Justice LUSH.)

REG. v. LAKE AND ANOTHER.(a)

*Indictment under 2 Will. 4, c. 53, s. 49, for falsely personating a soldier entitled to prize money.*

*On an indictment under the 2 Will. 4, c. 53, s. 49, which enacts that any person who shall knowingly and wilfully personate or falsely assume the name or character of a soldier entitled to prize money, or knowingly aid or assist anyone in so doing, in order to enable him to obtain prize money due to any other party, shall be guilty of felony, two persons were charged, one as having falsely personated a soldier entitled to prize money, and the other as an accessory before the fact, in causing and procuring him to commit the alleged felony. It appeared that the former, at the instigation of the other, had personated the soldier entitled to prize money, but that the other had represented that he was entitled to the prize money; and the defence was that he had purchased it from the soldier, which there was no express evidence to disprove:*

*Held, nevertheless, that both were guilty upon this indictment.*

**T**HIS was an indictment against two persons, named Lake and Bird, under the stat. 2 Will. 4, c. 53, s. 49, which enacted as follows:—

“That if any person shall knowingly and wilfully personate or falsely assume the name or character of any officer or soldier or other person entitled to or supposed to be entitled to any prize money, &c., due or payable, or supposed to be due or payable, for

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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—  
*False pretence*  
—*Personation.*

or on account of any service performed or supposed to have been performed by any soldier, &c., or shall knowingly or falsely assume any person, and assist in personating, &c., and in order to receive or enable any other person to receive any prize money, &c., or shall forge or counterfeit or alter, or knowingly aid in forging the name or handwriting of any officer or soldier entitled or supposed to be entitled, &c., such person shall be guilty of felony," &c. The indictment was very specially framed, and was as follows:—

That William Bird on the 21st of September, 1869, knowingly, willingly, and feloniously did falsely personate John Campbell, a soldier, who had before then really served as such soldier in a certain military service, to wit, the Saugor and Nerbudda Field Force of the East India Company, the said John Campbell then being entitled to certain prize money, viz., 75*l.* then due and payable to him for and on account of services before then performed by him as such soldier in such military service, with intent to defraud the most noble George Douglas Campbell, Duke and Earl of Argyll, then being the Secretary of State for India in Council. And then the count went on to charge Charles Lake as an accessory before the fact, that he knowingly procured Lake falsely, &c.

*Second count.*—Against Bird for falsely assuming the name and character of John Campbell, &c., as in first count, and against Lake as accessory before the fact in causing and procuring Bird to commit the felony alleged.

There were other counts varying the mere statement of the charge.

*Seventeenth count.*—Against both prisoners for knowingly, willingly, and feloniously, falsely forging, &c., a certain writing, viz., an application relating to the claiming of certain prize money, viz., 75*l.*, due and payable to John Campbell, a soldier who had before then really served as such soldier in a certain military service, viz., the Saugor and Nerbudda Field Force of the East India Company, for and on account of services before then performed by said John Campbell as such soldier, in order to claim such prize money from the said most noble George Douglas Campbell, Duke and Earl of Argyll, then being Secretary of State for India in Council, and then being a person authorised to pay the same, and with intent to defraud the said most noble George Douglas Campbell, Duke and Earl of Argyll.

*Eighteenth count.*—For uttering the same forged application with intent to claim said prize money.

The prosecution was instituted by order of the India Board, and

*Forsyth*, Q.C., and *Poland* appeared for the prosecution.

The prisoners were undefended.

It appeared upon the evidence that there was a sum of 75*l.* due to a private soldier named J. Campbell. On the 30th of July last a letter signed J. Campbell, and dated from a place in Poplar, was

received at the India Office. It purported to come from the man so named, and entitled to the prize money. In reply, a form was sent to him from the office, which was returned filled up, and signed J. Campbell. The Office then wrote that Campbell must apply in person; and then the prisoner Bird came and presented that letter, and, in answer to questions, said he was Campbell, and gave some particulars which were accurate, but on one point answered untruly. Being asked who gave him the letter, he said he had it from a man in the Park, who told him to present it and sign the receipt given to him as John Campbell. Lake was brought in, and Bird said he was the man, which Lake did not deny. It was proved that Lake, as Campbell, had given an address at which he had received letters addressed to Campbell, in answer to those he himself had written.

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".

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*False pretence*  
—*Personation.*

The defence was that Lake had purchased Campbell's prize money, and that he had induced Bird to believe that being entitled to it, and having Campbell's authority to receive it, he might use Campbell's name for the purpose, and authorise Bird to do so.

No evidence was adduced, in support of this defence, beyond the fact, which was proved by the prosecution, that Campbell was entitled to prize money, and that Lake had served with him.

On the other hand, there was no evidence to disprove the defence, though there were one or two circumstances which made it improbable, and Campbell was not called.

LUSH, J., to the jury.—The prisoners are indicted under a statute which makes it felony for one person falsely to represent himself as another, or to aid him in so doing in order to obtain the prize money due to that other. And the charge against them in substance is that they did concur or conspire together to represent that one of them was Campbell, who was entitled to prize money. And if you believe that Lake procured Bird to go into the India Office with the paper to represent himself as Campbell, the man named in the paper, in order to receive the money due to Campbell, and if you believe that Bird knowingly and wilfully represented himself to be Campbell, then, whatever his motive may have been, they are equally guilty in point of law, though there may be degrees of culpability fit to be considered by the executive authorities. Even if Bird believed Lake to be Campbell, yet if he falsely represented himself as Campbell, though authorised by Lake to do so, he would nevertheless be guilty in law. The letter which Lake received informed him that Campbell must personally appear, and according to the evidence Bird said he was Campbell.

*Guilty—sentence, five years' penal servitude.(a)*

(a) The learned judge said that as the statute made the maximum sentence seven years' transportation, and a subsequent statute had commuted this to five years' penal servitude, he had no alternative but to pass this sentence against both; though as regarded Bird he thought it excessive, and should so represent to the authorities. In the view taken by the learned judge, that both prisoners were legally guilty, it would not be necessary to prove that Lake had not Campbell's authority.

## CENTRAL CRIMINAL COURT.

OCTOBER SESSIONS, 1869.

(Before Mr. Justice KEATING.)

REG. v. WELSH.(a)

*Murder—Provocation—Manslaughter.*

*When a person has killed another with a deadly weapon, even upon sudden passion, the question as to the sufficiency of provocation to reduce the crime to manslaughter, is not merely whether there was passion in point of fact, but whether there was such provocation as might naturally kindle ungovernable passion in the mind of any ordinary and reasonable man.*

*Such provocation must be something serious—as a blow; and mere words, or gestures, not accompanied with anything of such a serious character, will not, in point of law, be sufficient to reduce the crime to manslaughter. Where there is the intention to kill (as shown by the use of a deadly weapon, and the infliction of a fatal blow in a mortal part), and there is absence of such serious provocation as might naturally kindle ungovernable passion in the mind of a reasonable man, the crime is murder.*

THE prisoner was indicted for that he feloniously and with malice aforethought did kill and slay one Abraham.

*Pater* for the prosecution.

*Ribton* for the prisoner.

The prisoner had claimed a debt from the deceased, and had summoned him to a police court, where the claim was dismissed. The prisoner went from the police office to a public-house, distant about a mile, whither in a short time the deceased also came. "You have got the better of me this time," said the prisoner to him." "Yes," answered the deceased, pleasantly; "I thought I should." "But," said the prisoner, "I'll have another summons out against you about it." "I am ready," replied the deceased, "to pay what any indifferent person may say is due." "Not you," said the prisoner; "you don't mean to pay anything." The deceased approached him, and offered to drink with him. The

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

prisoner refused, saying, "I will not drink with such a man as you." The deceased came near him. The prisoner said, "Don't come near me," and advanced towards him. The deceased retreated several paces. The prisoner came near him. The deceased held out his hand again, until it was within a few inches of the prisoner's face, apparently to ward him off, and saying at the same time, "Words as you like, but keep your hands off." The deceased struck no blow. The prisoner closed with him, and forced him down on a seat, and a few moments afterwards was seen almost upon him, in the act of stabbing him in the abdomen with a clasp knife. The blow was mortal, and the man died.

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WELSH.  
—  
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—  
Murder—  
Provocation—  
Manslaughter.

*Ribton*, for the prisoner, strove in cross-examination to elicit that there was some blow or push by the deceased.

The principal witnesses, in answer to the learned judge, said that they saw no blow or even push by the deceased; but that, on the contrary, it was the prisoner who shoved or pushed the deceased down.

*Ribton*, in addressing the jury for the defence, submitted that the question was not whether the provocation was or was not slight (as he admitted it was), but whether or not in point of fact the prisoner was under the influence of ungovernable passion at the time he struck the blow.

KEATING, J., however, said he should tell the jury that the question was, not merely whether there was passion, but whether there was reasonable provocation. (a)

*Ribton* cited Foster's Crown Law, 295, to show that the law made allowances for human passion, and he urged that upon the evidence there was clearly an assault upon the person by the deceased in holding his hand so near the prisoner's face, and that the probability was that there was a blow, as the witnesses heard the prisoner say "Keep off," and did not see precisely what had happened in the brief interval between that expression and the fatal blow. (b)

KEATING, J., in summing up the case to the jury, said: The prisoner is indicted for that he killed the deceased feloniously and with malice aforethought, that is to say intentionally, without such provocation as would have excused, or such cause as might have justified, the act. Malice aforethought means intention to kill.

(a) See Hale's Pleas of the Crown, vol. i. 466; Foster's Crown Law, 290; Roscoe's Criminal Evidence, by Fitzjames Stephen, p. 740.

(b) But it is laid down by all the authorities that the question is as to the amount of provocation, especially where a deadly weapon is used. "If a man kill another suddenly, without any, or without considerable, provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as might greatly have excited him, the killing is manslaughter only:" (1 Hale, 460; Foster, 240.) "In considering, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument wherewith the homicide was effected must also be taken into consideration, for if the homicide were effected with a deadly weapon, the provocation must indeed have been great to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to cause death, a less degree of provocation will suffice; in fact, the mode of resentment must be in a reasonable proportion to the provocation to render the offence manslaughter:" (Foster, 292.)

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Whenever one person kills another intentionally, he does it with malice aforethought. In point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear, the malice aforethought implied in the intention remains. By the law of England, therefore, all intentional homicide is *prima facie* murder. It rests with the party charged with and proved to have committed it to show, either by evidence adduced for the purpose, or upon the facts as they appear, that the homicide took place under such circumstances as to reduce the crime from murder to manslaughter. Homicide, which would be *prima facie* murder, may be committed under such circumstances of provocation as to make it manslaughter, and show that it was not committed with malice aforethought. The question, therefore, is—first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury whether it was such that they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man. The law, therefore, is not, as was represented by the prisoner's counsel, that, if a man commits the crime under the influence of passion, it is mere manslaughter. The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it—the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act. Now, I am bound to say that I am unable to discover in the evidence in this case any provocation which would suffice, or approach to such as would suffice, to reduce the crime to manslaughter. It has been laid down that mere words or gestures will not be sufficient to reduce the offence,<sup>(a)</sup> and at all events the law is clear that the provocation must be serious. I have already said that I can discover no proof of such provocation in the evidence.

(a) *R. v. Sherwood*, 1 C. & K. 556. And although it has recently been laid down by a very eminent judge that an assault of a very offensive nature, as spitting in a person's face, coupled with words of an extremely insulting character, may be sufficient to reduce the crime to manslaughter (*R. v. Smith*, 4 F. & F. 1066), that was a very peculiar case, and the learned judge said: "If an ordinary quarrel arose, and the wife spat at the husband, and he thereupon killed her, it would, I think, be murder. You must say whether the words and the other circumstances aggravated the provocation given by the assault so as to make it serious."



If you can discover it, you can give effect to it; but you are bound not to do so unless satisfied that it was serious. It is urged that there was an assault, and that it is probable there was a blow. That is for you to consider. What I am bound to tell you is, that in law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow—something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act. I endeavoured to elicit whether there was anything like a blow by the deceased, but failed to do so. It does not appear that there was anything beyond putting out his hand, which came near the prisoner's face. There is no evidence of his doing anything else; that is the evidence. Upon the evidence it is for you to ascertain whether, taking the law as I have laid it down, you can discover evidence of such a serious provocation as would reduce the crime to manslaughter.

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Murder—  
Provocation—  
Manslaughter.

*Guilty—sentence, Death.*

## CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1869.

(Before Mr. Justice MONTAGUE SMITH.)

REG. v. TAYLOR.(a)

*Practice—Postponement of trial.*

*Even upon an indictment recently found against a soldier for murder, and removed (under the recent Act) into the Central Criminal Court for the purpose of a more speedy trial, on an affidavit by the prisoner's attorney (the case being of recent occurrence) that he had not had sufficient time to prepare for the defence, and suggesting the possibility of a defence, the trial was postponed.*

THE prisoner, a soldier, was indicted for the murder of a fellow soldier; and the indictment having been recently found in a distant county (Devonshire) had been removed into this court for trial. The prisoner's attorney made an affidavit that he had reason to believe, and did believe, until Saturday the 14th of August (this being Wednesday, the 17th) that the prisoner would be tried at the assizes at Exeter; and that he had not had time properly to instruct counsel, nor to get up his defence; and that, under the circumstances, it was impossible that the prisoner could be properly defended at the present sessions. The attorney further stated that he had been informed and had reason to believe that there were witnesses living at a distance with whom he had been unable to communicate, and who could give evidence as to the fact of insanity having recently existed in the prisoner's family.

To this it was added by the prisoner's counsel that within the last quarter of an hour, and since the affidavit was sworn, he had seen a relative of the prisoner just come up from Devonshire, who stated to him, and was ready to depose, that the prisoner's father was in a lunatic asylum; that the prisoner himself was always considered as of a violent disposition, and had frequently been heard to say that he would cut his throat.

Sir R. Collier (Attorney-General), who, with Poland, appeared for the prosecution, observed that the affidavit was loose, and was

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

not materially aided even by the oral statement added. The very object of the act was to secure a speedy trial for the sake of a more salutary example.

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MONTAGUE SMITH, J., said he was reluctant to postpone a trial, but he was still more reluctant to force on a trial too quickly. No doubt the object of the act was to obtain a speedy trial, but this must be consistent with an observance of the ordinary rules of procedure. And as the attorney had only notice of the removal of the trial on Saturday, and had not had time to prepare his defence, or secure the attendance of witnesses residing in a distant part of the country, the trial had better be postponed.

Trial accordingly postponed until next sessions.

## CENTRAL CRIMINAL COURT.

AUGUST SESSION, 1869.

(Before Mr. Justice MONTAGUE SMITH.)

REG. v. DIXON.(a)

*Murder — Evidence — Use of deadly weapon — Intent to kill—  
Defence on the ground of insanity or homicidal impulse.*

*On an indictment for murder, it being proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression*

*Held, that this was not enough to raise the defence of insanity, that the sole question was whether the prisoner fired the gun intending to kill, and that his expressions soon after the act were evidence of this, and that alleged inadequacy of motive was immaterial, the question being not motive but intent.*

**T**HE prisoner, a soldier, was indicted for the murder of his officer.

Sir R. P. Collier (Attorney-General) and Poland for the prosecution.

*Straight for the defence.*

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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 Intent.

The prisoner had been several times reported by his corporal, the deceased, for trifling faults, and punished on these reports slightly. Just after receiving an order from him the prisoner suddenly loaded his rifle, and got it ready to aim at him. A fellow soldier interfered, but the prisoner said if he was interfered with the other should have the contents of the rifle, and an instant afterwards he aimed at the corporal and shot him through the head, and it came out that he said as he shot the deceased, "Take that!" and immediately afterwards, "I know what I have done, and am not sorry for it." It was elicited from the witnesses that the prisoner was addicted to drink, and that he had become depressed; but it did not appear that he was drunk on this occasion.

*Straight*, for the prisoner, read from Taylor's Medical Jurisprudence many passages as to homicidal monomania, and suggested that defence for the prisoner, urging the suddenness of the act and the absence or inadequacy of any apparent motive.

Sir R. Collier (Attorney-General), who had waived his right to sum up the evidence under Denman's Act, claimed his right of reply on behalf of the Crown.

His LORDSHIP to the jury.—The only question is whether you are satisfied that the prisoner intentionally fired at the deceased and killed him. There is no provocation in the case that can possibly reduce the crime below that of murder, supposing you are satisfied that he fired the rifle intentionally and meaning that the bullet should strike the deceased. The evidence is that he fired and shot him in the head. Was it intentionally done? As to that his expressions are material. As to motive, if you find a man intentionally kills another, knowing the nature of the act, that is sufficient; there is no evidence to raise the defence of insanity.

*Guilty—sentence, Death.*

## COURT OF CRIMINAL APPEAL.

*November 13, 1869.*

(Before KELLY, C.B., MARTIN, B., BLACKBURN, LUSH, and  
BRETT, JJ.)

REG. v. WILLIAM MARTIN.(a)

*Coining—Felony—Having possession of counterfeit coin after previous conviction—Course of proof at trial—24 & 25 Vict. c. 99, ss. 12 and 37.*

*On the trial of an indictment for felonious possession of counterfeit coin, with intent to utter the same, after a previous conviction, the course of proceeding at the trial is prescribed by sect. 37 of 24 & 25 Vict. c. 99, viz., first to try that part of the offence which relates to the possession, and then, if the prisoner be found guilty, to try the prisoner for the previous conviction.*

CASE reserved for the opinion of this Court by William Forsyth, Esq., Q.C, sitting as a Commissioner at the Leeds Summer Assizes.

William Martin was tried before me on the charge of being unlawfully in possession of counterfeit coin, he having been before convicted of unlawfully uttering counterfeit coin.

The following is a copy of the indictment :

Yorkshire, West Riding Division, } The jurors for our Lady the  
to wit. } Queen, upon their oath,  
present that William Martin, on the 10th of April, 1869, unlawfully had in his custody and possession fifteen pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for fifteen pieces of the Queen's current silver coin called crowns ; five pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coin called florins, and five pieces of false and counterfeit coin resembling and appa-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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rently intended to resemble and pass for five pieces of the Queen's current silver coin called shillings, knowing the said several pieces of false and counterfeit coin to be false and counterfeit, and with intent unlawfully, fraudulently, and deceitfully to utter and put off the same, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence hereinbefore mentioned, to wit, at a special session and delivery of the gaol of our Lady the Queen, holden at Lincoln, in and for the county of Lincoln, on Friday the 11th of December, in the twenty-first year of Her present Majesty's reign, the said William Martin, in the name of Martin Kelley, was, in due form of law, convicted on a certain indictment against him for that he on the 14th of November in the twenty-first year of the reign aforesaid, at the parish of Gainsborough, in the county of Lincoln, did unlawfully utter and put off to Mary Pycock one counterfeit half-crown, knowing the same to be false and counterfeit, against the form of the statute in such case then made and provided. And that the said William Martin, in the name of Martin Kelley, was thereupon ordered to be imprisoned in the House of Correction and kept to hard labour for the term of two years. And so the jurors aforesaid, upon their oath aforesaid, do say that the said William Martin on the day and year first aforesaid, feloniously and unlawfully had in his custody and possession the said several pieces of false and counterfeit coin, knowing the same to be false and counterfeit, and with intent unlawfully, fraudulently, and deceitfully to utter and put off the same in manner and form aforesaid, and against the form of the statute in such case made and provided.

*Second count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said William Martin afterwards, to wit, on the 10th of April, 1869, feloniously and unlawfully had in his custody and possession fifteen pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for fifteen pieces of the Queen's current silver coin called crowns, and five pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coin called florins, and five pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coin called shillings, knowing the said several pieces of false and counterfeit coin to be false and counterfeit, and with intent unlawfully, fraudulently, and deceitfully to utter and put off the same, against the form of the statute in such case made and provided. And the jurors aforesaid upon their oath aforesaid, do say that heretofore, and before the committing of the offence in this count mentioned, to wit, at a special session and delivery of the gaol of our Lady the Queen, holden at Lincoln, in and for the county of Lincoln, on Friday, the 11th of December, in the twenty-first year of Her present Majesty's



reign, the said William Martin, in the name of Martin Kelley, was in due form of law convicted on a certain indictment against him, for that he on the 14th of November, in the twenty-first year of the reign aforesaid, at the parish of Gainsborough, in the county of Lincoln, did unlawfully utter and put off to Mary Pycock one counterfeit half-crown, knowing the same to be false and counterfeit against the form of the statute in such case then made and provided. And that the said William Martin, in the name of Martin Kelley, was thereupon ordered to be imprisoned in the House of Correction and kept to hard labour for the term of two years.

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At the outset of the case Mr. Forbes, the counsel for the prosecution, called a witness, and proposed to give in evidence a certificate to prove the previous conviction of the prisoner. Mr. Middleton, the counsel for the prisoner, objected, and I, having regard to the 37th section of the act 24 & 25 Vict. c. 99, refused to receive the evidence at that stage of the case.

Evidence was then given to show that the prisoner was guilty of the subsequent offence charged, but I refused to allow evidence to be given of the previous conviction until the jury should give their verdict upon the subsequent charge.

At the close of the case for the prosecution, the counsel for the prisoner contended that there was no case of felony to go to the jury, for that the offence of being in possession of counterfeit coin was, by the 12th section of the above statute, made felony only when there had been a previous conviction of an offence relating to the coin, and no such previous conviction had been proved.

I allowed the case to go to the jury upon the question whether the prisoner was guilty or not of the subsequent offence.

The jury found a verdict of guilty.

The prisoner was then asked whether he had been previously convicted as charged in the indictment, and he admitted that he had been so convicted.

Feeling doubtful whether I had done right, first in refusing to admit the certificate when it was tendered in evidence, and, secondly, in leaving to the jury the question of the prisoner's guilt as to the subsequent offence before the previous conviction had been proved, I deferred passing sentence, and the prisoner remains in custody.

I desire to have the opinion of the Court for the Consideration of Crown Cases Reserved whether I was right in rejecting the certificate when it was tendered in evidence, and in submitting to the jury the question whether the prisoner was guilty of the subsequent offence before the previous conviction had been proved against him.

WILLIAM FORSYTH.

*Forbes* for the prosecution.—The question was reserved in order to ascertain what is the proper mode of proceeding upon

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the trial of offences of this kind. The indictment is under the 12th section of 24 & 25 Vict. c. 99, which enacts that "Whosoever having been convicted of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall be guilty of felony." By the 11th section, the having three or more pieces of counterfeit gold or silver coin in possession, with intent to utter or put off the same, is made a misdemeanor. Upon the trial of indictments of this kind different modes of proceeding have prevailed. The 37th section, however, seems to apply. That enacts that "Where any person shall have been convicted of any offence against this act, or any former act relating to the coin, and shall afterwards be indicted for any offence against this act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only of the indictment. . . . And the proceedings upon *any* indictment for committing any offence after a previous conviction shall be as follows (that is to say), the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty he shall then, and not before, be asked whether he had been previously convicted, and if he answer that he had been so previously convicted, the court may proceed to sentence him; but if he deny that he had been so previously convicted the jury shall then be charged to inquire concerning such previous conviction. [BLACKBURN, J.—Mr. Justice Crompton pointed out the difficulty on this section. The charge in the indictment is for felony, which cannot be unless the prisoner has been previously convicted; but he said the technical difficulty must give way to the common sense of the words of the section, and the first thing to be tried was, was the prisoner guilty of the misdemeanor? And then, if he was, had he been previously convicted.] Willes, J., at the Warwick Assizes in 1851, Lush, J., at the Leeds Assizes in 1867, and Mellor, J., had ruled that it was necessary to prove the previous conviction first, and then the other part of the offence. [MARTIN, B.—To make the offence a felony, I should have thought it right to prove the previous conviction first, but sect. 37 directs how the proceeding is to be.] Sects. 20 and 21 were then referred to.

No counsel appeared to argue for the prisoner.

KELLY, C. B.—Section 37 prescribes the course of proceeding on the trial of such indictments as this, and that was the course adopted in the present case. The conviction will, therefore, be affirmed.

LUSH, J.—When I directed a different course at the Leeds

Assizes my attention was not called to sect. 37, but I afterwards discovered it, and that prescribes the course of proceeding.

The rest of the Court concurred.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

November 13, 1869.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., LUSH, J., and  
BRETT, J.)

REG. v. MACGRATH.(a.)

*Larceny—Obtaining money under influence of a threat—Mock  
auction.*

*A woman went into a mock auction room, where the prisoner professed to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25s. A man standing between the woman and the door said to the prisoner that she had bid 26s. for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it before she would be allowed to go out, and she was prevented from going out. She then paid 26s. to the prisoner because she was afraid, and left with the cloth :*

*Held, that these facts were sufficient to sustain a conviction for larceny.*

CASE reserved for the opinion of the Court for the Consideration of Crown Cases Reserved.

At the Court of Quarter Sessions for the borough of Liverpool on the 30th of August, 1869, Peter MacGrath was tried upon an indictment which charged him with feloniously stealing 26s. of the moneys and property of Peter Powell.

It was proved at the trial that on the 26th of August, 1869, Jane Powell, the wife of the prosecutor Peter Powell, between three and four o'clock in the afternoon, passed a sale room, and upon being invited to enter, did so. There were about one dozen

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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persons in the sale room, and the prisoner was acting as auctioneer, and selling table-cloths and other articles.

After two table-cloths had been sold and purchased by two women who were present, a piece of cloth was put up for sale by auction, the prisoner acting as auctioneer. A man bid 25s. for it, when another man standing between Jane Powell and the door said to the prisoner that she had bid 26s. for it, upon which the prisoner knocked it down to her.

The witness, Jane Powell, said : “ I had not bid for it nor made any sign. I told the prisoner I had not bid ; he said I did. I said I did not, and would not pay for it. I said this several times. I went to go out. The prisoner said I had bid for it, and must pay before I would be allowed to go out. I was then prevented going out by the man who had said I had bid for it. He stood between me and the door, and said I must pay for it. I wanted to go out and the man prevented me. I then paid 26s. to the prisoner. I paid the money because I was afraid. The piece of cloth was then given to me and I took it away.”

In about an hour after she returned and saw the prisoner, and told him she could not keep the cloth as she had not bid for it. He told her he could not give the money back, but if she came the following week he would exchange it.

The next day the place was closed when Peter Powell and his wife went to call there about the cloth ; but close by in the street the prisoner and the man who said she had bid, and another man by whom Jane Powell had been invited on the first occasion into the sale-room, were seen together and immediately separate and go different ways.

Peter Powell followed the prisoner, and said to him, “ I believe you are the man who forced my wife to pay for a piece of cloth she never bid for.” Upon which he replied, “ I told her to come to the house on Monday.” After some little struggle and endeavour to escape on the part of the prisoner, he was given into custody.

When charged, he said to the policeman, “ She cannot lock me up, she paid me the money.”

Mr. Commins, counsel for the prisoner, objected that the facts did not prove a larceny.

I directed the jury, that if the prisoner had the intention to deprive her of her money, and in order to obtain it was guilty of a trick and artifice, by fraudulently asserting that she had made a bid, when she had not, as he well knew, and that he obtained the money by such means, he was guilty of the offence charged.

The jury found that no bid had been made by Jane Powell, which the prisoner knew, and that he obtained the money from her by the trick and artifice mentioned above.

A verdict of guilty was then entered.

I postponed passing sentence, and remanded the prisoner back to gaol, and reserved the question, “ Whether the facts proved a

larceny?" and also the question, "Whether I rightly directed the jury," for the decision and opinion of the Court of Criminal Appeal.

LEOFRIC TEMPLE,  
Assistant Barrister to the Recorder of Liverpool.

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*Commins* for the prisoner.—This was not a larceny, but a parting with property under simple duress. It is similar to the case of *Rex v. Woods* (2 Leach, 721), where the prosecutrix was threatened by some persons at a mock auction to be sent to Bow-street, and from thence to Newgate, unless she paid for an article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that, unless she gave him a shilling she must go with him; and thereupon she gave him a shilling, not from apprehension of personal danger, but from fear of being taken to prison, and it was held that this was not sufficient to constitute the offence of robbery, and that it was only a simple duress. So here all that the prosecutrix was told was that she must pay for the cloth before she would be allowed to go out. If, however, this was robbery the prisoner should have been indicted for that offence. [BLACKBURN, J.—Robbery is larceny and something more. BRETT, J.—In *Woods's* case the prisoner was indicted for robbery.] Secondly. The property must be obtained by a trick or artifice which the prosecutrix believed. [BLACKBURN, J.—That would be so upon an indictment for false pretences, but not for larceny.] Thirdly. This was not larceny, because the prosecutrix intended to part with her money. She accepted the piece of cloth, paid her money for it, and took it away. *Rex v. Wilson* (8 C. & P. 111), was like this case: there the prisoner pretended to pick up a purse containing, as he said, a gold chain and seals, and induced the prosecutor to buy the chain and seals for 7*l.*, which were worth a few shillings only, and it was held not to be larceny, because the prosecutor intended to part with his money. Lastly. The judge misdirected the jury; he should have told them to find whether the woman parted with her money in consequence of the threat and against her will, or voluntarily. It is only found that she paid the money through fear.

*McConnell*, for the prosecution.—This was larceny. The prisoner's intention at the time of obtaining the money is material. The jury found that the prisoner knew that no bid had been made by the prosecutrix, and that the money was obtained from her by the trick and artifice. The jury could not have thought that she parted with her money voluntarily. Where the prosecutor was decoyed into a public-house, and the play of cutting cards was introduced, and he did not play on his own account, but was prevailed upon to cut the cards for one of the prisoners, and then, under pretence that the prosecutor had cut the cards for himself and had lost, his money was swept off the table and carried away, it was held that it was for the jury to say *quo animo* the money

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was obtained, and that it would be larceny if there was a preconcerted plan to steal it: (*Rex v. Horner*, 1 Leach, 270.) In this case the money was not voluntarily parted with, there was no intention to buy the cloth, and the trick and threat both operated on the prosecutrix's mind, and induced her to part with her money. Where the prisoners got the prosecutrix to open her hand and let them have some money, and, having obtained it, they refused to give up a dress they had promised on that occasion, it was held to be larceny: (*Reg. v. Morgan*, Dears C. C., 395.) Money may be obtained in such a way as to amount to larceny, although it may be obtained with force and menaces: (*Reg. v. Walton*, 9 Cox Crim. Cas. 268; L. & C. 483.)

KELLY, C.B.—I am of opinion that this conviction should be affirmed. It appears that the prisoner acted as and professed to be an auctioneer, and to sell table-cloths and other things by auction; that a piece of cloth was put up for sale by auction, and that a man bid 20s. for it, when another man standing near the prosecutrix said to the prisoner that the prosecutrix had bid 26s. for it, upon which the prisoner knocked it down to the prosecutrix. An altercation then took place, and the prosecutrix said she had not bid for it. The prisoner knew that that was so, but said she did. She said she did not, and would not pay for it, and then went to go out of the room. The prisoner said she must pay for it before she would be allowed to leave, and stood between her and the door, and prevented her leaving. She then paid 26s. to the prisoner, as she said, because she was afraid, and took the piece of cloth away with her. The meaning of the finding of the jury must be taken to be that she paid the money against her will. The prisoner, in fact, obtained the money by a subterfuge, and also by what amounted to a threat of personal violence, and under these circumstances the prosecutrix parted with her money against her will. The case falls within the definition of larceny given by Bracton: *Furtum est secundum leges contractatio rei alienæ fraudulenta cum animo furandi, invito illo domino cujus res illa fuerit*. In more modern times, in East, P. C. 553, larceny is defined to be the "wrongful or fraudulent taking of another's goods with a felonious intent to convert them to the taker's own use and make them his own property." That definition has been adopted by Parke, B., Eyre, C. J., and other judges of high authority. The present case comes within that definition. And I find the following definition given by the Criminal Law Commissioners, who were men of great learning: "The taking and carrying away are felonious where the goods are taken against the will of the owner, either in his absence or in a clandestine manner, or when possession is obtained either by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods, and where the taker intends in any such case fraudulently to deprive the owner of the entire interest in the property against his will:" (*Roscoe Crim. Ev.* 569.) The money was taken in



this case against the will of the owner, for it cannot be contended for a moment that she parted with it voluntarily. And it was also obtained by a trick, device, or false expedient—not so much a false pretence as a false expedient of another kind, the prisoner pretending that something had taken place which he knew had not. And he also operated on her fears by threats. It is unnecessary to consider whether sufficient force was used to constitute a robbery. It was further argued that the learned Deputy Recorder had misdirected the jury. It may be that it would have been better if he had directed them to consider whether the money was not obtained by threats, which the prosecutrix might construe into threats of personal violence; but that is not the question reserved for us. We cannot, however, say that the jury were improperly directed in being asked if the money was obtained by a trick or artifice; and it would have been superfluous to leave to the jury the question whether the money was obtained against the will of the prosecutrix. For the above reasons I think a larceny was proved, and that the conviction must be affirmed.

MARTIN, B.—I am of opinion that a larceny was proved; and though the facts would, I think, have proved a robbery also, that does not prevent a conviction for larceny.

BLACKBURN, J.—I also think the conviction must be affirmed. What we are to see is whether the direction to the jury was right. To constitute larceny there must be the *animus furandi*, and the property must be taken against the will of the person from whom it is taken. The ingredients that act on the will of the party must be to a certain extent the same both in the case of robbery and larceny, and in both the property must be taken against the will of the person. It would be a great scandal if taking money out of a person's pocket were to be larceny, but not to be so if the person was frightened into giving up her money against her will. No point was reserved as to whether or not the money was obtained from the prosecutrix against her will, and if there had been any doubt on the point the jury should have been asked the question; but the evidence shows a preconcerted intention to take the money from her against her will, and there was abundant evidence of the *animus furandi* in the conduct of the parties.

LUSH, J.—I doubted at first whether there was a sufficient fraudulent taking to constitute larceny, but upon consideration I think there was, and that the money was demanded by the prisoner *animo furandi*, and obtained from her against her will.

BRETT, J.—I also have had doubts whether there was sufficient evidence to support a conviction in this case. If the case had rested on the principle of the money having been obtained by a trick, I should have thought that there was not. The case, if so put, would have failed in this, that if the woman by the trick was induced to part with her money she did so willingly, and in this case with intent that it should be taken away by the

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prisoner. But, upon consideration, I think that this conviction may be supported on the ground that the woman parted with her money against her will, by reason of unlawful violence used and threatened by the prisoner. I had doubts whether the threat of imprisonment was sufficient; but upon consideration I think that a threat of immediate personal restraint made by a person present, and having power to carry such threat into execution may reasonably be said to cause a person to do what this woman did against her will, and that is sufficient to make the giving up of property such a taking of property by a prisoner as to constitute the crime of larceny.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*November 13, 1869.*

(Before KELLY, C.B., MARTIN, B., BLACKBURN, LUSH, and BRETT, JJ.)

**REG. v. WILLIAM RITSON and SAMUEL RITSON.(a)**

*Forgery—Deed—Ante-dating.*

*R. made an equitable deposit of title-deeds with G. for 730l., and afterwards assigned all his property to B. for the benefit of his creditors. R. and his assignee B. then, for an additional advance, conveyed to G. the freehold of the property to which the deeds deposited related. After this the prisoner R. executed a deed of assignment to the other prisoner of a large part of the land so conveyed to G. for a long term of years; but this deed was falsely antedated before the conveyance by R. and B. to G., and upon this deed the prisoners resisted G.'s title to possession of this part of the land:*

*Held, that this deed so ante-dated for the purpose of defrauding G. amounted to forgery.*

**C**ASE reserved for the opinion of the Court by Mr. Justice Hayes.

The prisoners were indicted before me at the last Manchester

(a) Reported by JOHN THOMSON, Esq., Barrister-at-Law.

Assizes under the 24 & 25 Vict. c. 98, s. 20, for forging a deed with intent to defraud James Gardner.

William Ritson was the father of Samuel Ritson, and was a builder. He had been entitled to certain building land at Heaton Norris in Lancashire, which had been conveyed to him in fee; and he had borrowed on the security of it of the prosecutor, James Gardner, more than 730*l.*, for which advances he had given on the 10th of January, 1868, an equitable mortgage by written agreement and deposit of title-deeds.

On the 5th of May, 1868, William Ritson executed a deed under the Bankruptcy Act of 1861, conveying all his real and personal estate to James Booth, a trustee, for the benefit of creditors; and on the 7th of May, 1868, by deed between James Booth, the trustee, of the first part, and William Ritson of the second part, and the said James Gardner of the third part, reciting the said deed of assignment, and that James Gardner had become mortgagee of the said building land, and that there was then due to him 789*l.* 6*s.* 2*d.* for principal and interest, and that the said James Booth and William Ritson, having caused a valuation to be made, had ascertained that the said sum was in excess of the value of the said hereditaments, and that there were some building materials on the land not fixed to the freehold, and that it had been agreed between the parties to the deed to convey the land and assign the materials for 50*l.* to the said James Gardner. It was witnessed that the said James Booth and William Ritson, in consideration of the said sum paid as therein mentioned (*viz.*, 49*l.* to Booth and 1*l.* to William Ritson), did respectively grant, convey, and confirm unto the said James Gardner the said freehold land (subject to the two indentures therein mentioned, being previous conveyances to other parties by the said William Ritson of two small plots thereof), and all the estate, claim, and demand of the said James Booth and William Ritson therein to and to the use of the said James Gardner, his heirs, and assigns for ever, with a covenant from the said James Booth and William Ritson, that they or one of them had full power to grant the said lands and hereditaments as aforesaid free from all incumbrances, except as appeared by the said deed, but which deed contained no mention of the deed found to be a forgery as after mentioned, but only mentioned the conveyance of the said two small plots.

After the execution of the said conveyance to the prosecutor he entered into possession of the ground so conveyed to him.

About March, 1869, the prosecutor had buildings erecting on adjoining land, and had employed William Ritson as a builder, and had given him permission to erect a shed on part of the ground so conveyed as aforesaid, which was done. The prosecutor afterwards wished to have it removed; but the two Ritsons, the son being then working with his father, refused to do so, and the prosecutor removed it himself. On the 20th of April, 1869, the prosecutor received a letter from a solicitor written on behalf of Samuel Ritson, claiming title to the land, and complaining of

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prosecutor having trespassed thereon by pulling down a building, and offering to show the deed under which Samuel Ritson claimed. And on the 26th of April, a writ in an action of trespass, at the suit of Samuel Ritson, was sued out and served on the prosecutor. The prosecutor then saw the attorney for Samuel Ritson, who produced the deed charged as a forged deed, and the prosecutor commenced the prosecution against the two prisoners before the magistrates.

This deed is dated the 12th of March, 1868, the date being before William Ritson's deed of assignment and the conveyance to the prosecutor, and purports to be made between William Ritson of the one part, and Samuel Ritson of the other part; it recites the original conveyance in fee to William Ritson, and that William Ritson had agreed with Samuel Ritson for a lease to him of part of the land, at a yearly rent of 18*l.* 3*s.* 4*d.*, and then professes to demise to Samuel Ritson a large part of the frontage, and most valuable part of the land, which had been equitably mortgaged and afterwards conveyed to the prosecutor, as mentioned above, for the term of 999 years from the 25th of March then instant. The said deed contained no notice of any title legal or equitable of the prosecutor, and contained the usual covenants between a lessor and lessee. It was executed by both William and Samuel Ritson, and professes to have been attested by a witness; but such witness was not called at the trial, nor was any evidence given as to the professional man or other person by whom the deed was prepared. Although the date of the deed was the 12th of March, 1868, it was proved by the stamp distributor who had issued the stamp, that it was not in fact issued from the office by him before the 7th of January, 1869, nor was the deed ever mentioned by the prisoners before that year.

It was contended on the part of the prosecutor that the deed was a forged deed, made after the prosecutor's conveyance, and antedated for the fraudulent purpose of over-reaching that conveyance, and so endeavouring to deprive the prosecutor of his estate under the said conveyance, and of a considerable part of the property for a long term, and leaving only a valueless reversion in him in such part of the property. And in support of this view the counsel for the prosecution cited 1 Hawk. P. C. c. 21, p. 263, 8th edit.; and *Salway v. Wals*, Moo. 655; 5 Eliz. c. 14; and 2 Russ. on Crimes, 4th edit., 719; and see 3 Inst. 169, Bac. Abr. "Forgery."

The counsel for the prisoners contended that the deed could not be a forgery, as it was really executed by the parties between whom it purported to be made, and that there was no modern authority in support of the doctrine contended for by the prosecution. He also contended that the prosecutor had obtained his conveyance by fraud, and that it was void against the prisoners, and if so the lease would be rightfully made.

The jury found that there was no ground for imputing any fraud to the prosecutor with regard to his security and convey-

ance, and I having expressed an opinion in conformity with the authority cited on the part of the prosecution, and informed the jury that if the alleged lease was executed after the prosecutor's conveyance, and antedated with the purpose of defrauding him, it would be a forgery.

The jury found both the prisoners guilty.

And in pursuance of the request of the prisoners' counsel, I reserved the question whether the prisoners were properly convicted of forgery under the circumstances, for the opinion of this Court.

G. HAYES.

*Torr*, for the prisoners.—The ruling of the learned judge at the trial was wrong, and the conviction cannot be sustained. The authorities cited for the prosecution were very ancient, and it is submitted that they cannot be supported at the present day. The authority of Lord Coke in the 3rd Inst. 169 is his comment on the stat. 5 Eliz. c. 14, which enacts, "If any person or persons, upon his or their own head or imagination, or by false conspiracy or fraud, shall wittingly, subtilly, and falsely forge or make, or subtilly cause or wittingly assent to be forged or made, any false charter, deed, or writing, sealed, &c., to the intent (*inter alia*) that the right, title, or interest of any person or persons of, in, or to tenements or hereditaments, freehold or copyhold, may be molested," &c. Lord Coke, in commenting on the words "or make," says, "These be larger words than to forge, for one may make a false writing within this act, though it be not forged in the name of another, nor his seal nor hand counterfeited. As if A. make a true deed of feoffment under his hand and seal of the manor of Dale unto B., and B., or some other, raze out D the first letter of Dale, and put in S, and then where the true deed was of the manor of Dale, now it is falsely altered and made the manor of Sale. This is a false writing under seal within the purview of this statute. To forge is metaphorically taken from the smith who beateth upon his anvil and forgeth what fashion or shape he will." The case of *Salway v. Wale* is no doubt an authority that to alter, by antedating a deed, is a forgery if it prejudices any third person's estate. The deed in the present case was not a forgery or false deed; it was made by the parties between whom it purports to be made, and there was no alteration in it at all. It may be a void instrument, but it is not a forgery. [MARTIN, B.—Mr. Russell, in his work on Crimes gives this definition of forgery at common law, "the fraudulent making or alteration of a writing to the prejudice of another," or, more recently, "a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit;" the word "making" being considered as including every alteration of or addition to a true instrument.] It is contended that this is not a false deed, though the finding of the jury shows the date to be so. Deeds which contain false recitals or averments

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are not, therefore, false deeds within the provisions of the statutes relating to forgery. The present statute (24 & 25 Vict. c. 98, s. 20) enacts, "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." The question, therefore, is whether this deed is a forgery within the words of that statute, and it is submitted that it is not: (Com. Dig. Forgery, A. 1.) This was a re-enactment of the 11 Geo. 4, & 1 Will. 4, c. 10, and it is submitted that by the change of language it was intended to narrow the statute of Eliz.

*Addison*, for the prosecution.—The conviction is right, for, both upon principle and authority the making of the deed in question was a forgery. At common law the false making of a letter, or order, or guarantee, was a misdemeanor, but not a capital offence, and the false making of a deed is within all the statutes. There is in support of the prosecution the authority of Lord Coke, and the case in Moor and Com. Dig. A. 1, "Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another." This was a deed fraudulently antedated to the prejudice of the prosecutor's estate in the land. So in Bacon's Abr. A., "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or, at least, to make a man's own act appear to be done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and in justice it ought not to have." [MARTIN, B., referred to *Lewis' case* (Foster C.C. 117).] That definition seems to comprehend this case.

KELLY, C.B.—I certainly entertained some doubt at one time upon this case, because most of the authorities are of an ancient date, and long before the passing of the statutes of 11 Geo. 4 & 1 Will. 4, and 24 & 25 Vict. However, looking at the ancient authorities and the text-books of the highest repute, such as Com. Dig., Bacon's Abr., 3 Co. Inst., and Sir Michael Foster, they are all uniformly to the effect, not that every instrument containing a



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false statement is a forgery, but that every instrument which is false in a material part, and which purports to be that which it is not, or to be executed by a person who is not the real person, or which purports to be dated on a day which is not the real day, whereby a false operation is given to it, is a forgery. It is impossible to distinguish the present case from the authorities cited, and therefore the conviction must be affirmed.

MARTIN, B.—I am of the same opinion. Mr. Torr says, no doubt rightly, that this is not an ordinary instance of a deed that is a forgery. The authorities are all to the effect that it is a forgery: and in Tomlin's Dictionary I also find this passage: "Forgery may be committed by a party making a false deed in his own name, as where a party made a feoffment of lands, and dated it prior to a former deed, whereby he conveyed the same lands, for he falsifies the date in order to defraud his own feoffee."

BLACKBURN, J.—I am of the same opinion. The 24 & 25 Vict. makes it a felony if any person with intent to defraud shall forge or alter any deed, &c. The material word is "forge," and it is necessary, therefore, to see what is the meaning of forgery. It is correctly defined in Com. Dig. to be the making any false instrument with a fraudulent intent, that is an instrument that purports, on the face of it, in some material thing to be that which it is not. Then we have Gilbert, C. B.'s definition of forgery in Bac. Abr. (see *supra*). In this case the false statement is in the date which, in ordinary cases, would not be material; but here, by extrinsic evidence, the false date was shown to be very material, and the forged deed would have passed the estate to another person than the prosecutor if the deed had been executed on the day it bears date. Lord Coke, in his 3rd Inst., cites several cases from the Year Books to show that the forging a deed does apply to this very thing. The same was held in the case in Moor, and in *Lewis' case* in Foster (C. C. 116), and there is no authority against it. The conviction, therefore, is right.

LUSH, J.—If the prisoner had put the true date to the deed in the first instance and then altered it, there could not have been a question as to its being a forgery within the statute. It seems absurd to hold that the making a deed falsely dated from the beginning, whereby a fraudulent operation is given to it, would not equally be a forgery. The Legislature used the word "forge" in the sense of the decided authorities, namely, the making of a deed which purports to be that which it is not.

BRETT, J., concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 13, 1869.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, LUSH, and  
BRETT, JJ.)

REG. v. DAVID JONES. (a)

*Bigamy—Knowledge of the first wife being alive—Direction  
to the jury.*

*In 1863 the prisoner married Mary Anne Richards, lived with her about a week, and then left her. It was not proved that he had since seen her. In 1867 he married Elizabeth Evans, his first wife being then alive. On the trial of an indictment for bigamy, the learned judge told the jury that they must be satisfied that the prisoner knew that his first wife was alive at the time of the second marriage :*

*Held, that the direction of the judge to the jury was right, and that it was not necessary to prove affirmatively that at the time of the second marriage the prisoner knew that his first wife was alive.*

CASE reserved for the opinion of this Court by Mr. Baron Channell.

The prisoner David Jones was tried before me at the last Assizes for Carmarthenshire.

The indictment charged the prisoner with marrying Mary Anne Richards, and afterwards, and during her life, feloniously marrying one Elizabeth Evans.

The prisoner was convicted, and the conviction is to be taken as correct, subject only to the question hereinafter stated.

The prisoner on the 29th of June, 1863, married Mary Anne Richards. On the 29th of November, 1867, he married the said Elizabeth Evans.

Mary Anne Richards was proved to be alive at the time of the trial.

It was proved on cross-examination that the prisoner lived with

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

her for about a week, and then left her. It was not proved that he had since seen her.

For the prisoner it was contended that affirmative proof must be given that at the time of his marriage with Elizabeth Evans, the prisoner actually knew that Mary Anne, his first wife, was alive. The case of *Reg. v. Lumley* (38 L. J. 86, M. C.; 11 Cox Crim. Cas. 274) was relied on.

I overruled the objection, holding that positive proof on that point was not absolutely necessary.

I left the case to the jury, telling them they must be satisfied that the prisoner knew his first wife was alive at the time of the second marriage.

The question is whether I was at liberty to do so, or whether, upon the authority of the case referred to, I was bound to direct an acquittal. If I ought not to have left the case to the jury, the conviction is to be reversed.

The prisoner is not in custody, but is to be called up for sentence if the conviction is held good.

W. F. CHANNELL.

No counsel appeared on either side to argue the case.

KELLY, C.B.—We need not say more than that the case was properly left to the jury, and that the conviction must be affirmed.

The rest of the Court concurred.

*Conviction affirmed.*

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—  
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*Bigamy—  
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## COURT OF CRIMINAL APPEAL.

November 13, 1869.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, LUSH, and  
BRETT, JJ.)

REG. v. RAUDNITZ.

*Evidence—"London Gazette"—Production.*

*The mere production of a copy of the "London Gazette" purporting to be printed by authority, containing an advertisement of adjudication of bankruptcy is sufficient proof of the adjudication of bankruptcy under the 12 & 13 Vict. c. 106, s. 240.*

CASE reserved for the opinion of this Court by the Recorder of the City of London.

At a session of the Central Criminal Court on the 19th of August, 1869, Sidney Raudnitz was tried before me on an indictment charging him with obtaining goods on credit, within three months of adjudication of bankruptcy against him with intent to defraud.

To prove the adjudication of bankruptcy against him, there was tendered in evidence and admitted by me the annexed printed document purporting to be the *London Gazette*, and purporting to advertise the adjudication of bankruptcy. It does not upon its face purport to be printed by the Queen's printer.

*Metcalf*, for the prisoner, objected that this document must be proved to be the *London Gazette* before it could be admitted as evidence of its contents or of the adjudication.

The prisoner was convicted, and, there being no other evidence of the adjudication of bankruptcy, I reserved the question for the decision of the Court for the consideration of Crown Cases Reserved: Whether the above document was sufficiently proved to be the *London Gazette*?

If the Court should be of opinion that the above evidence was insufficient, the conviction must be reversed.

The prisoner is in gaol awaiting judgment. See *Rex v. Forsyth*, Russ. & Ry. 277.(a)

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v.  
BAUDNITZ.

1869.

Bankruptcy—  
Evidence.

*Metcalf* for the prisoner.—The evidence received was inadmissible. The objection to the reception of the evidence is based upon *Reg. v. Wallace* (17 Ir. Com. Law Rep. 207), where the defendant was charged upon an indictment under the stat. 11 Vict. c. 2 (for the better prevention of crime and outrage in Ireland), for having a pistol and gunpowder within the proclaimed district of Shankhill, and a copy of the *Dublin Gazette* was tendered in evidence, containing the proclamation of the district, purporting to be printed and published at the *Dublin Gazette* Office, No. 87, A.-street, by A. T. of &c., and under the title were the words, "Published by authority," but it was held not to be evidence within the 11 Vict. c. 2, s. 21, which enacted that the production of the *Dublin Gazette*, purporting to be printed by the Queen's printers, containing the publication of any proclamation under the act, should be deemed and taken as conclusive evidence in all courts of justice in Ireland of all facts, &c. In that case there was nothing to show by what authority the paper was printed. So in this case all that appeared was a paper purporting to be the *London Gazette*. Surely that is not sufficient to let it in as evidence of the *London Gazette*. In *Rex v. Holt* (5 T. R. 436), the *London Gazette* put in evidence purported to be printed by the King's printer. [LUSH, J.—Sect. 240 of 12 & 13 Vict. c. 106, says that a copy of the *London Gazette*, and of any newspaper containing any such advertisement as by the act directed, shall be evidence of any matter therein contained. The only question is, was this shown to be the *London Gazette*?] To show that, it should have purported to be printed by the Queen's printer. [BRETT, J.—If there is evidence on which the Judge was reasonably satisfied that it was the *London Gazette*, was it not admissible?] More must be shown than the mere title *London Gazette*.

*Giffard*, Q. C. and *Besley*, for the prosecution, were not called upon to argue.

KELLY, C.B.—The conviction must be affirmed. In *Reg. v. Wallace*, the words of the statute which makes a copy of the *Dublin Gazette* evidence of the proclamation are, that the production of the *Dublin Gazette* purporting to be printed by the Queen's printers, containing the publication of any proclamation under the act shall be conclusive evidence of all such facts, &c., but there are no such words in sect. 240 of the Bankruptcy Act (12 & 13 Vict. c. 106), upon which the present question depends.

(a) In *Rex v. Forsyth* (Russ. & Ry. 274), to prove notice in the *London Gazette*, of issuing a commission of bankruptcy, a paper purporting to be the *Gazette* was put in, but no evidence was given that it was bought at the office of the King's printer, nor any further evidence beyond the mere production. The Judges seemed to think (sic) that the production of the *Gazette* would be sufficient without proof of its being bought of the *Gazette* printer, or where it came from.

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*Reg. v. Wallace* is in effect an authority against Mr. Metcalfe's contention, for the Judges said if the paper had purported to be printed by the Queen's printers it would have been sufficient. The objection therefore fails, and the production of the paper in question purporting to be the *London Gazette*, and to be printed by authority, was sufficient proof of the adjudication of bankruptcy of the defendant.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 13, 1869.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., LUSH, J., and BRETT, J.)

REG. v. GEORGE THOMPSON. (a)

*Housebreaking implements—24 & 25 Vict. c. 96, s. 58—Possession.*

*Where several persons are found out together by night for the common purpose of housebreaking, and one only is in possession of the housebreaking implements, all may be found guilty of the misdemeanor of being found by night in possession of implements of housebreaking without lawful excuse (24 & 25 Vict. c. 96, s. 58), for the possession of one is in such case the possession of all.*

CASE reserved for the decision of the Court for Consideration of Crown Cases Reserved.

At the General Quarter Sessions of the peace in and for the County of Surrey, on Thursday, the 29th of July, 1869, George Thompson and William Jones were charged upon the following indictment :

Surrey. The jurors for our Lady the Queen upon their oaths present, that George Thompson and William Jones at about the hour of two of the clock, *ante meridiem*, of the 22nd of July, 1860, at the parish of St. George the Martyr, Southwark, in the said county of Surrey, were found, they the said George Thompson

(a) Reported by JAMES THORNTON, Esq., Barrister-at-Law.



and William Jones, then and there by night, as aforesaid, unlawfully having in their possession without lawful excuse certain implements of housebreaking, that is to say, one crow, one knife, one candle, and twenty lucifer matches, against the form of the statute in such case made and provided. And the jurors aforesaid upon their oath aforesaid do further present that before the time of committing the misdemeanor hereinbefore mentioned, the said George Thompson and William Jones were severally convicted of felony; that is to say, the said George Thompson, by the name of John Patterson, at the general session of the peace held at the Sessions House on Clerkenwell-green, in and for the county of Middlesex, on Monday, the 4th of March, 1861, and the said William Jones, by the name of Samuel Lambert, at the adjourned general session of the peace, held at the Session House, on Clerkenwell-green, in and for the county of Middlesex, on Monday, the 20th of May, 1867.

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housebreaking  
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William Jones pleaded guilty; and it was proved that George Thompson was found along with Jones, Jones having on his person the crow and the knife, and George Thompson having on his person the candle and lucifer matches.

It was contended that a candle and lucifer matches were not housebreaking implements within the meaning of the statute, and that Thompson could not be said to be in possession of the crow and the knife found on Jones.

Thereupon the Court directed the jury, that if they were of opinion that Thompson was in the company of Jones, with the same object as Jones, and for the purpose of housebreaking, they should find him guilty on the indictment, and that they might take into their consideration the fact of the candle and lucifer matches being found on him as showing the purpose to which the crow and the knife were intended to be applied, but that the candle and lucifer matches alone could not be held to be housebreaking implements within the meaning of the statute.

The jury returned a verdict of guilty, and the Court reserved the question for the Court for the Consideration of Crown Cases Reserved, whether the possession of housebreaking implements by one of two persons for a common object is the possession of each.

Judgment on Thompson was respited, and he was committed to the county gaol at Newington until the decision of the Court for Consideration of Crown Cases Reserved should be known.

THOS. TILSON, Chairman.

*Straight* for the prisoner.—The conviction cannot be sustained. There was no evidence of Thompson's being in possession of housebreaking implements. The indictment is founded on the 24 & 25 Vict. c. 96, s. 58, "whoever shall be found by night armed with any dangerous or offensive weapon or instrument whatever with intent to break or enter into any dwelling house

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or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling house or other building whatsoever, with intent to commit any felony therein, shall be guilty of a misdemeanor." The enactment makes the offence an individual and personal one. It cannot be that it intended to cast on one person the obligation of making an excuse for another person who is in possession of housebreaking implements. [LUSH, J.—Suppose each of them had hold of a crowbar by the ends, so that neither had exclusive possession, would not the statute apply? Or if a burglar were to hire a little boy to carry his implements, could he not be convicted under it?] [BLACKBURN, J.—Or if the implements were in a pannier on an ass's back, could the donkey be said to be in possession of them?] In the statutes relating to coining (24 & 25 Vict. c. 99, s. 1) and forgery (24 & 25 Vict. c. 98, s. 45), criminal possession is defined, but not in this statute.

No counsel appeared for the prosecution.

KELLY, C.B.—The possession of one is the possession of all. Under the Game Laws it has been held that where several persons go out poaching in the night time, and one is armed with a gun, all are armed: (See *Reg. v. Goodfellow and others*, 1 Den. C. C. 81.)

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 20, 1869.

(Before KELLY, C.B., MARTIN, B., BYLES, BLACKBURN, and  
LUSH, JJ.)

REG. v. HODGKISS.(a)

*Perjury—False oath at common law—Affidavit under Bills of  
Sale Act (17 & 18 Vict. c. 36).*

*A false oath, sworn in an affidavit for the purpose of procuring the registration of a bill of sale in pursuance of the 17 & 18 Vict. c. 36, is a misdemeanor at common law, of which a person may be found guilty upon an indictment for setting out the facts, and concluding with the usual averment that the prisoner committed "wilful and corrupt perjury," which concluding words may be rejected as surplusage.*

CASE reserved by Pigott, B., for the opinion of the Court for the Consideration of Crown Cases Reserved.

The prisoner was tried before me at the last Summer Assizes for the county of Worcester, upon an indictment which charged that he committed wilful and corrupt perjury in an affidavit sworn by him before a commissioner for taking affidavits in the Court of Queen's Bench.

The affidavit was sworn before the Commissioner at Stourbridge, and was made for the purpose of getting a bill of sale filed.

It was material, in the affidavit, to state the date when the bill of sale was made, which the prisoner swore was on the 18th of December, 1868, whereas it was, in fact, made on the 4th of January, 1869.

The counsel for the prisoner objected that such an affidavit could not be the subject of an indictment for perjury, not being, as he contended, sworn in a judicial proceeding.

I overruled the objection, and left the case to the jury, who found the prisoner guilty. But I reserved the case for this Court

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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upon the above objection, being pressed by the counsel so to do ; and the prisoner was admitted to bail.

The Bills of Sale Acts are the 17 & 18 Vict. c. 36 ; and 29 & 30 Vict. c. 96. G. Pigott.

No counsel appeared on either side.

KELLY, C.B.—The prisoner was convicted on an indictment which charged him with having committed wilful and corrupt perjury in an affidavit required by the Bills of Sale Act, which was sworn by him before a commissioner for taking affidavits in the Court of Queen's Bench, and the question for our decision is whether he was properly convicted or not. The offence was not wilful and corrupt perjury in the strict sense of that term, and, therefore, the prisoner would not be liable to the more severe punishment which can only be imposed in cases of perjury ; but it is quite clear that the taking of a false oath in an affidavit which is required by an Act of Parliament, in order to obtain the registration of a bill of sale, is a misdemeanor at common law, subjecting the person taking the false oath to punishment. It is true that the indictment in this case, after setting out the facts, concludes, "and so the jurors say that the prisoner committed wilful and corrupt perjury." I think that those words may be treated and rejected as surplusage, and then what remains upon the indictment would show a sufficient case of misdemeanor at common law upon which the prisoner might properly be convicted. I therefore think the conviction should be affirmed.

MARTIN, B.—I am of the same opinion. That this case may be treated as pointed out by the Lord Chief Baron is shown by *Rex v. Foster* (R. & R. 459), where the prisoner was indicted for perjury in taking a false oath for the purpose of procuring a marriage licence. In that case the conviction was quashed because the facts stated were not sufficient to show a misdemeanor, but here they are.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

November 20, 1869.

(Before KELLY, C.B., MARTIN, B., BYLES, BLACKBURN, and  
LUSH, JJ.)

REG. v. REDFORD.(a)

*Embezzlement—Master and servant—Benefit Building Society—  
Secretary—Trustees.*

*The trustees of a Benefit Building Society borrowed money for the purposes of their society on their individual responsibility (there being no rule of the society authorising them to borrow money). The money on one occasion was received by the secretary, and embezzled by him :*

*Held, that the secretary might be charged in the indictment for embezzlement as the servant of W. and others, W. being one of the trustees and a member of the society.*

CASE reserved for the opinion of this Court at the Quarter Sessions for the city of Manchester, held on the 26th of August, 1869.

William Gregory Redford was tried and found guilty on an indictment which charged him with the embezzlement of 500*l.*, the property of E. G. Williams and others his masters.

For the purposes of this case the conviction of W. Gregory Redford is to be deemed and taken to be a good conviction, unless the facts stated are not evidence of the crime of embezzlement.

CASE.

There had existed in Manchester for some years a building society, the rules whereof were duly registered under the provisions of the 6 & 7 Will. 4, c. 32. These rules may be referred to, and are to be taken as part of this case.

Under Rule 11 George Christopher Williams and others were appointed, and still acted as the trustees of the said society.

Under Rule 14 the prisoner was appointed by the trustees and

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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managers to be secretary to the society, and continued to act as such secretary up to January last.

The trustees almost from the commencement of the society's operations, had borrowed, upon their individual responsibility, and on the security of promissory notes, signed by some of them respectively, moneys from persons willing to lend the same. The moneys thus borrowed were subsequently employed for the purposes of the society, *i.e.*, in making advances to members on mortgage and otherwise. These promissory notes were for the most part drawn out by the prisoner, and when signed by some of the trustees were delivered by him to the lender in exchange for the amount of the loan.

About the 23rd of July, 1868, the prisoner prepared such a promissory note, of which the following is a copy, as the same now appears.

" 500*l.*

" Manchester, July 23, 1868.

" Two months after notice to the secretary, W. G. Redford, we jointly and severally promise to pay to John William Fuller the sum of 500*l.*, together with interest thereon after the rate of five pounds per centum per annum from the date hereof, for value received.

" CHARLES MEREDITH, THOMAS WIGHTBOURNE, GEORGE C. WILLIAMS, THOMAS ANDERTON, WILLIAM WILSON, B. TOULSON, JAMES EYRE, Trustees and Managers to the Ninth South Lancashire Building Society.

" Witness to signatures, W. G. REDFORD."

The body of the note, and the attestation, is in the prisoner's handwriting, and the other signatures were given by the managers and trustees in due course.

The evidence of the prisoner's receipt of the money which was the amount of the promissory note, consisted of the production of a letter written and signed by him, dated the 23rd of July, 1868, and of an entry in the list or statement of liabilities hereinafter mentioned. The said letter was in the words following:

" Ninth South Lancashire Benefit Building Society,

" 21, Dickenson-street.

" W. G. REDFORD, Secretary.

" Manchester, July 23, 1868.

" Dear Sir,—The 500*l.* is safe to hand, and your leaving it with my clerks was perfectly right and in accordance with my instructions. If you wish the signatures witnessed, I shall be happy to do so any time you like to call here with the note.

" I am, yours truly,

" WILLIAM G. REDFORD.

" J. W. Fuller, Esq., Lower Brighton."



In the month of January, 1869, the said G. C. Williams went to the prisoner and found him writing out a document, which prisoner stated to be a list of his defalcations, in these words : "This is the amount of my defalcations, and I have no money." In this document, which was produced in evidence, there is an entry in the following words :

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"J. Fuller. 500*l.* Copy destroyed, but I remember he would have it fully signed, so the names would be Meredith, Williams, Wightbourne, Wilson, Eyre, Anderton, and Toulson."

No part of the 500*l.* was ever paid by the prisoner to the society, or any of its trustees or managers ; and on the 27th of July, 1869, that sum, with interest, was paid to Fuller by the seven makers of the promissory note.

It was objected before me on behalf of the prisoner that on the evidence this indictment was not proved.

1. Because if by the words "G. C. Williams and others," in the indictment, it was to be taken that the makers of the promissory note as individuals (whose money the 500*l.* was upon its receipt by the prisoner) were described, the relation of master and servant never existed between the prisoner and those individuals.

2. But if by the words "G. C. Williams and others," it was to be taken that, by virtue of the stat. 10 Geo. 4, c. 56, s. 21, incorporated with the stat. 6 & 7 Will. 4, c. 32, the trustees of the society (whose servant the prisoner was) were properly described, then the money alleged to be embezzled was not money of his masters, the trustees, as such, the statute only vesting in the trustees, and enabling to be described accordingly in an indictment what was the property of the society as such.

3. That if the prisoner were the servant, and the money the property of the said G. C. Williams and others, the letter of July 23, 1868, which was the evidence of the receipt thereof by the prisoner, showed that the money was therefore in the constructive possession of his masters by the hand of a fellow servant.

I overruled these objections, and let the case go to the jury. The prisoner was found guilty and sentenced, but I reserved for the consideration of this Court the following question :

Was there evidence of embezzlement by the prisoner to go to the jury ; if there was not, the conviction is to be quashed ; if there was, the conviction is to stand.

HENRY W. WEST,  
Recorder of Manchester.

*Holker*, Q.C. (*Ambrose* with him), for the prisoner.—The conviction was wrong, for the prisoner was not the servant of Williams and others. The third objection will not be relied upon. There is no rule of this society that authorises the trustees to borrow money, and it is found in this case that the 500*l.* was borrowed on the personal security of the trustees. [BLACKBURN,

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J.—Can the prisoner object that the borrowing of the money was a breach of trust by the trustees? Suppose a clerk in a railway company indicted for embezzlement, could he object that the money embezzled was obtained on the security of one of Lloyds' bonds?] [MARTIN, B.—Is this society a corporation?] No. [MARTIN, B.—If it is not a corporation, the society consists of a number of individuals like an insurance company, that calls itself by a certain name.] By sect. 21 of the 10 Geo. 4, c. 50, which is incorporated into the Building Societies Act (6 & 7 Will. 4, c. 32), the property of a building society is vested in the trustees or treasurer for the time being, and it is to be taken to be for all purposes of action or suit as well criminal as civil, and may be described in any such proceedings as the property of the person appointed treasurer or trustee of such society. Here it is clear that the money was borrowed by the trustees on their individual responsibility. [BLACKBURN, J.—The money was intended as a loan to the society, and the trustees were merely suréties for its repayment.] Until they applied the money to the purposes of the society it was their money. [BLACKBURN, J.—Suppose an infant wants a loan, and he requests a friend to obtain it for him on his personal security, and the friend sends the money to the infant by a person in the infant's employ, who embezzles it, why is not that person the servant of the infant?] The prisoner was not authorised to receive money by the rules of the society, and he held the money for the persons it belonged to, but he was not their servant. [LUSH, J.—The trustees are members of the society, and you say it was their money, and that the prisoner was a clerk of the society. Now it has been held that a servant in the employment of a partnership must be considered as the servant of each member, and if he embezzle the private money of one he may be charged as the servant of that individual partner: (*Rex v. Leech*, 3 Stark, 70; *Reg. v. Bailey*, 7 Cox Crim Cas. 179; 1 Dears & Bell).] It is submitted that the prisoner was the servant of the trustees, and should have been indicted as their servant *qua* trustees.

*Jordan*, for the prosecution, was not called upon to argue.

KELLY, C.B.—The cases cited by my brother Lush are decisive of this case, and show that the prisoner may be described in the indictment either as the servant of the trustees of the building society, or of the trustees individually. If the prisoner was the servant of the society he is properly described as the servant of the persons of whom the society is composed, though it may consist of a great number of persons. If the money was, as in law and in fact it was in this case, the money of the society, the prisoner may be properly charged, as in this indictment, with embezzling the property of Williams and others as the members of the society. If, on the other hand, as was argued, it was the money of the trustees by reason of their having acted as the representatives of the society, although they gave their personal security for its repayment, and intended to apply it for the pur-

poses of the entire society, yet, until they so applied it, it remained the individual property of the trustees, then the prisoner may be charged as their servant. So that taking it either way the conviction was right and must be affirmed.

MARTIN, B.—When once it is ascertained that the society is not a corporation, every difficulty is solved. The members of the society may call themselves a society, but they are in reality nothing more than a number of persons formed into a partnership.

BYLES, J. concurred.

BLACKBURN, J.—These trustees made themselves individually liable for the repayment of this money, but they borrowed it for the society as sureties. There is no doubt that it was the money of the society, though there may be some doubt whether the trustees could have enforced the charge against the society. It is like the case of a railway company with no borrowing powers, borrowing money on the security of the directors personally; or, perhaps, it is more like the case of an infant borrowing money on the security of a friend. The indictment properly charges the prisoner as the servant of Williams and others, and the conviction must be affirmed.

LUSH, J. concurred.

*Conviction affirmed.*

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## PRIVY COUNCIL.

*June 22 and July 17, 1869.*

(Present: The Right Hon. Sir WILLIAM ERLE, the LORD CHIEF BARON (SIR FITZROY KELLY), Sir ROBERT PHILLIMORE, and Sir JOSEPH NAPIER.)

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (app.) v.  
MICHAEL MURPHY (resp.)

*New South Wales—Conviction for felony—Venire de novo—New trial—Access of jury to newspapers—Jurisdiction of Supreme Court of New South Wales—Irregularity not avoiding verdict—Remedy.*

*The respondent was tried for murder, at a session of oyer and terminer and gaol delivery in New South Wales, and was convicted and sentenced to death.*

*Afterwards an application on behalf of the prisoner was made to the Supreme Court of the colony, sitting in banco, for a rule to show cause why a venire facias de novo should not issue for the trial of the prisoner. On further affidavits the rule was made absolute, and it was also ordered that a suggestion should be made on the record to the effect that after the jury had been empanelled, and before verdict, the jurors were allowed, during certain adjournments of the court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come:*

*Held (reversing the judgment of the Supreme Court of New South Wales), that the above order vacating the judgment of the verdict, and for a venire facias de novo was invalid:*

*First. Because this was substantially an attempt to grant a new trial on the ground that the conviction was unsatisfactory by reason of irregularity in the conduct of the trial, and the dis-*

*cretion to grant new trials does not extend to cases of felony :* ATT.-GEN. FOR  
 (Reg. v. Bertrand, 16 L. T. Rep. N.S. 752 followed.) N. S. WALES

*Secondly. Because the Supreme Court sitting in banco had not jurisdiction to take cognizance as a court of appeal of the judgment pronounced at the session of oyer and terminer, which had come to an end before the session in banco began.*

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*Thirdly. Because the evidence was insufficient, in that on mere hearsay information it showed only possible access by the jury to newspapers, without showing that the newspapers contained matter tending to influence the jury improperly, or that they were ever read by the jury.*

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*The cases in which a verdict upon a charge of felony has been held to be a nullity, and a venire facias de novo awarded, have been cases of defect of jurisdiction in respect of time, place, or person, or cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon; but there is no authority for holding a verdict of conviction or acquittal in a case of felony, delivered before a competent tribunal in due form, to be a nullity by reason of some conduct on the part of the jury, considered unsatisfactory by the court.*

*If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority, with whom rests the discretion either of executing the law or commuting the sentence.*

**T**HIS was an appeal from a judgment of the Supreme Court of New South Wales delivered on September 24, 1867. The appellant, the Hon. James Martin, Her Majesty's Attorney-General for the colony of New South Wales, sought to obtain the reversal, alteration, or variation of that judgment.

The main facts of the case were as follows:—

On the 12th of August, 1867, an information was filed in the Supreme Court of the said colony, at Sydney, by the appellant, as attorney-general, that the respondent did, on the 22nd of November, 1865, at South Creek, in the said colony, feloniously, wilfully, and of malice aforethought, kill and murder one Samuel Hassan.

To this information the respondent pleaded not guilty, and issue was joined thereon.

The respondent was, on the 19th, 20th, and 21st of August, 1867, at the session of the said court of oyer and terminer and general gaol delivery then holden, tried, upon the said information, before the Hon. Alfred Cheeke, one of the judges of the said court, and a jury of twelve jurors duly empanelled and sworn.

After having heard the evidence for the Crown and the prisoner, and having been addressed by the counsel for the Crown and the prisoner respectively, and charged by the said judge, the jury, on the said 21st of August, retired from the bar of the court to consider their verdict. On the following day they returned into

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court, and by their foreman stated that they had not agreed, and were not at any time likely to agree concerning their verdict; and having been then kept, without separating, for the space of upwards of three days and three nights—during more than twenty-seven hours of which they had been deliberating on the matters before them—they were discharged by the judge from giving any verdict.

The respondent was again tried on the said information at the next session of the said supreme court as a court of oyer and terminer, and general gaol delivery, on the 10th, 11th, 12th, 13th, and 14th of September, 1867, before the Honourable Peter Faucett, one of the judges of the said court, and another jury, duly empanelled and sworn. And on the said 14th of September, the jury found that the respondent was guilty of the felony and murder charged, and thereupon the respondent was by the court sentenced to death.

After the adjournment of the court on the evenings of the said 10th, 11th, 12th, and 13th of September, respectively, the said jurors were lodged at "Butt's" Metropolitan Hotel in Sydney, under the charge of the sheriff's officer. During the times when they were at such hotel, and before giving their verdict, the said jurors were allowed the use of the newspapers of the day, containing alleged reports of the trial so far as it had gone. The heading of the report in one of such papers was "The South Creek Murder Case," and in one report the following passage was contained: "The witness was cross-examined, but was not shaken in his evidence."

The said jurors were also allowed during the time of their sojourn at the said hotel to hold communication, without the permission of the presiding judge, with persons other than the officers in charge of them; but such communications had no reference to the matters in issue.

On the 19th of September, 1867, a rule was granted by the said Supreme Court, calling upon the appellant to show cause why a *venire de novo* should not issue for the trial of the respondent on grounds appearing in an affidavit of James Hart, referred to in the said rule, and which grounds were in substance that the said jurors, after they had been empanelled to try the said case, and during their sojourn at the said hotel and before they delivered their verdict, were allowed the free use of the said newspapers containing the said reports; and that without the permission of the presiding judge, but with no reference to the matters in issue, intercourse was permitted between the said jurors and other persons not being in charge of them during the time they were at the said hotel.

On the 24th of September, 1867, the said rule was, after reading certain further affidavits, and after hearing counsel for the Crown and for the respondent, made absolute, and by such rule absolute it was ordered that an entry should be made on the record of the respondent's conviction of the said charge to the effect that,



after the jury had been empanelled to try the case, and before they delivered their verdict, they were improperly allowed the free use of the newspapers of the day which contained reports of the trial as far as it had gone, in one of which newspapers the heading given was "The South Creek Murder Case," and lastly that a *venire facias de novo* should issue for the trial of the respondent upon the said charge. The judgment below was not written, but the reasons for that judgment were afterwards stated for the purpose of the appeal, and were as follows:—

Stephen, C.J.—I am of opinion that there must be a *venire de novo*. It is laid down in Tidd's Practice, 2nd vol. 953 (8th edit.), citing a note to *Davies v. Pierce* (2 T. R. 126), that a *venire de novo* is grantable when the jury have misconducted themselves. The authority quoted for this position is a case mentioned in 2 Strange, 887. In Viner's Abridgment (title "Trial," K. g. 4), it is said that "*capias* was awarded against the under-sheriff charged to keep a jury, and he permitted them to go and to have meat and drink, for he, upon his examination, confessed the matter, which is of record now, and he is an officer, and therefore *capias*, &c., and against the jury, because the matter is only surmise, *venire facias* was awarded, and another *venire facias* between the parties at issue to return a new jury." In the margin it is added, that Brooke says, "it seems that this matter was confessed or notably proved" (Br. Jurors, pl. 12). In Hale's Plea of the Crown (p. 36), it is said that "if, after the jury sworn, either party deliver a piece of evidence to the jury, and the verdict is given for him that delivered it, it shall avoid the verdict, but then this must appear by examination, and be endorsed upon the *postea* or verdict so as it appears of record." The distinction between an award of a *venire de novo* and a rule for a new trial appears to be, says Manning, Serjt., in a note to *Gould v. Oliver* (2 M. & G. 238), "that the former is always founded upon some irregularity or miscarriage apparent upon the face of the record, whilst the latter is an interference by the Court, in the discretionary exercise of a species of equitable jurisdiction, for the purpose of relieving a party against a latent grievance. After a rule for a new trial, and a new trial had thereon, the record is in the same state as if no trial, except the last, had taken place, whereas upon a *venire de novo* the fact of the first trial, and the circumstances under which that trial became nugatory or abortive, and which rendered a second trial a matter not of discretion, but of right, necessarily appear on the record." And, again, in the following page, Hale (P. C. 308, Hale, C. J.) says: "If depositions are read in Court to the jury, and after the jury sworn and going from the bar, the solicitor or prosecutor for the king or party, without consent of parties or order of the Court, deliver the copies of the deposition to the jury, if they find against him on whose part the copies were delivered the verdict is good, but if they find for him on whose part they were delivered, and this appear by examination, and be (as it ought to be) endorsed upon the *postea* or

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record, the verdict shall be quashed, and a new *venire facias* or award for a new jury shall be returned." If the court is satisfied by evidence before it that there has been a miscarriage of justice, the authorities show that the Court has authority to direct the matter to be entered on the record, and it thus appears on what ground the *venire de novo* is awarded. I think, therefore, that it is our duty to direct the matter to be stated on the record, as was done in *R. v. Fowler* (4 B. & A. 273.) An entry was there made like the one I propose to have made in this case. I am satisfied that what occurred here was by the permission of the officers in charge of the jury, they being in fact officers of the Crown. The jurors were allowed to read, and some of them did in fact read, reports (or papers purporting to be reports) of the evidence daily given at the trial, or said to have been given, so far as it had proceeded. There is nothing to show whether the evidence was rightly or wrongly reported. These reports may, as far as appears, have been written by the Crown, or the authority of the Crown. It is sufficient to say that the officers of the Crown permitted the jurors to read reports, or what purported to be reports, of the trial. Such a proceeding, in my opinion, was wrong and dangerous in the last degree. The newspapers might have contained a comment on the trial. In fact, the following passage was contained in the report, "The witness was cross-examined, but was not shaken in his evidence." What was done must be considered to have been done by one of the parties to the proceeding, and therefore it vitiates the verdict. I have come to this conclusion, although keenly alive to the absurdity of adhering to form rather than substance in the conduct of criminal proceedings. It is quite possible to pervert rules of practice so as to secure impunity to guilt. But I think that there has been in this case a substantial miscarriage of justice, or, at all events, an extreme risk of such miscarriage. The mischief is obvious, and the proceedings so dangerous that no Court could sanction it. It is better to allow the case to go down to another trial than to allow the verdict to stand. As to the effect of communicating with a jurymen in respect to indifferent matters, it would be monstrous, I think, to say that a jurymen should not receive a communication from his wife as to the illness of a child, or as to circumstances which might irretrievably injure his fortunes. I never understood that jurymen might not receive communications of this kind. In order to set aside a verdict on such ground, it would be necessary to show that some mischief had been caused by what had occurred.

Hargrave, J.—First, I concurred generally in the Chief Justice's elaborate statement in court, and review of the old authorities as to writs of *venire de novo* from very early date to the present time, but, not having read the written reasons of the Chief Justice as now filed, I assume that these authorities justify the technical issue of this writ on this present occasion, on the ground that the trial was conducted with such a substantial and

gross miscarriage of justice as required the whole trial to be treated as a nullity, and this independently of all consent from any party. Secondly, I think that the giving of printed newspapers to the jurors during the trial containing (as was admitted) alleged reports of the case composed by mere newspaper *employés*, or any other unofficial bystanders, being the usual popular summaries of the evidence, interspersed with remarks upon the relative importance and effect of particular testimony, the demeanours of the witnesses, the reporter's opinion as to the effect and bearing of cross-examination, and the usual condensed popular narrative of the speeches of counsel, and other court proceedings of this trial, were circumstances which constituted a substantial miscarriage of justice, and which seemed to me to come strictly (however unintentionally) within the common law offence of "embracery," defined (by Hawkins, P. C. vol. 1, c. 86, ss. 1, 5, and other authorities, cited at Russell's Crim. Law, chap. 21) to be "any practice which tends to affect the administration of justice by improperly working on the minds of jurors." The jurors ought not even to be "instructed by letters, persuasions, &c.," but only by the strength of the evidence, and the arguments of counsel in open court. If such a practice as that under consideration should now be authoritatively sanctioned by this Court, or even for an instant tolerated, it is impossible to foresee the perversions of justice which may easily follow; and the common law and statutes referred to by Hawkins and Russell were intended to prevent all such irregularities by making all such offences indictable. Thirdly, I think that the delivery of these newspapers to the jury, whether by way of substitution for the perusal of the judge's notes, or in addition thereto, was, in fact, a gross contempt of Court, and within the decisions of Lord Langdale in *Littler v. Thompson* (2 Beav. 129), and of Lord Cottenham in *Lechmere Charlton's case* (2 My. & Cr. 217), as an "attempt by private communication to influence the conduct of anyone invested with the duty of judicially disposing of matters pending in Court," or "to obstruct the ordinary course of justice." I need scarcely point out that the delivery of these alleged reports, even though being open, and in Court, or even by consent of the judge and of the parties, are circumstances not in the slightest degree altering the illegality of such conduct, as contrary to all judicial regularity and criminal procedure. Fourthly, I considered the decisions of the House of Lords in *O'Connell's case*, and of the Privy Council in *Bertrand's case*, as strongly directed against all such exceptional novelties in criminal procedure, being necessarily calculated to render trial by jury "a delusion, a mockery, and a snare," and to "interrupt the due and orderly administration of the law." Many other mischiefs, theoretical and practical, arising from the course adopted in this case, were pointed out by Mr. Pilcher as counsel for the prisoner, but the above were the chief grounds of my own judgment. I think it right to add, that the report in 6 S. C. R. 24 to 35, is very erroneous in many particulars.

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Faucett, J.—The following is in substance what I said when giving judgment in this case: Having expressed my general concurrence in the observations made by the Chief Justice and Hargrave, J., I then said, I am of opinion that an irregularity has been committed, and the only question is how it ought to be remedied. The Court cannot say that the matters improperly brought before the jury did not influence their minds. The irregularity complained of was allowed by the officer of the Crown who had charge of the jury, and the case is in this respect somewhat analogous to those cases in which evidence had been, without leave of the Court, handed in to the jury by one of the parties or by the attorney of one of the parties; but, as I consider the act was an oversight on the part of the officer, I prefer to rest my decision on the general ground that what purported to be a report of the evidence had got improperly into the hands of the jury, by which their minds might have been prejudicially affected, and that this was an irregularity. And, on the whole I consider that this irregularity having taken place out of court, and without the knowledge of the presiding judge, was, in effect, such a misconduct on the part of the jury as ought to render the verdict void; and that, in accordance with and in analogy to the authorities cited in 21 Viner's Abr., title "Trial" (G. g., 6 to 19) a *venire de novo* ought to be granted. I also think that the matter complained of ought to be set out on the record.

A suggestion in pursuance of the said rule absolute was thereupon entered upon the record, and an entry was also made on the said record that it had been ordered by the said Court that the judgment on the said verdict should be vacated, and that the sheriff should cause a new jury to come for the trial of the issue joined upon the information aforesaid, and that the prisoner was remanded to the custody of such sheriff in order to take his trial on that information accordingly.

The appellant, Her Majesty's Attorney-General for the colony of New South Wales, afterwards presented a petition for special leave to appeal to Her Majesty in Council against the said judgment of the 24th of September, 1867, vacating the judgment on the said verdict, and awarding a *venire de novo*; and on the 29th of February, 1868, Her Majesty in Council gave the appellant special leave to appeal (5 Moo. P. C. N. S. 47), on the same conditions as were imposed in *Attorney-General of New South Wales v. Bertrand* (4 Moo. P. C. N. S. 460.)

Sir Roundell Palmer, Q.C., and Cohen, for the appellant.—The ordering a *venire facias de novo*, under the above circumstances, was in effect granting a new trial. In *R. v. Bertrand* (10 Cox Crim. Cas. 618) it was held that, according to the English law prevailing in New South Wales, the Supreme Court there has no power to grant a new trial in a case of felony. The previous case of *R. v. Scaife* (5 Cox Crim. Cas. 243), in which a new trial, after

conviction for felony at the assizes, was granted by the Court of Queen's Bench, was there examined and overruled. And in the present case a *venire facias de novo* could not be granted. The rule as to such writs is correctly laid down in *Witham v. Lewis* (1 Wils. 55), where it is said, "a *venire facias de novo* can only be granted in one or other of these two cases; first, if it appear upon the face of the verdict that the verdict is so imperfect that no judgment can be given upon it; secondly, where it appears that the jury ought to have found other facts differently; and it cannot be granted in any other case." See, too, *Davis v. Lucas* (2 T. R. 126, and note), *R. v. Huggins* (2 Str. 887; 2 Raym. 1585), *R. v. Keite* (1 Raym. 138; Viner's Abr., title "Trial," K. g. 3; K. g. 4 (1), (25); Hale's P. C. c. 42, p. 306) and *R. v. Fowler* (4 B. & Ald. 273). In the present case the matters relied upon for issue of a *venire facias de novo* were not such as to warrant the Court in awarding such a writ. The cases that will be probably relied on by the other side were before the courts in error on appeal. But the Supreme Court in New South Wales had no jurisdiction in error or on appeal. The verdict was given by a jury duly empanelled, and there was nothing that amounted to a mis-trial.

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The *Solicitor-General* (Sir J. D. Coleridge, Q.C.) and *Archibald* for the respondent.—There was such a substantial miscarriage of justice in the course of the second trial, in allowing the jury the use of the newspapers, as to amount to a mis-trial. The jury ought only to be instructed by the strength of the evidence and the arguments of counsel in open court, and allowing them to read newspaper reports of the trial as it proceeds had a tendency to interfere with the due and orderly administration of justice. The case of *R. v. Bertrand* (*ubi supra*) is no doubt a decision that there could be no new trial, but there is a clear distinction between a *venire facias de novo* and a new trial. The latter will be granted where any irregularity sufficient to avoid the trial appears on the record, and that whether the suggestion on the record was made before or after judgment: (See Archbold's Crim. Pl. 16th edit., 165–8; 1 Chitty Cr. Law, 654; Deacon Cr. Law, 1341.)

Reference was also made to *R. v. Campbell* (1 Cox Crim. Cas. 269), *R. v. Yeadon* (9 Cox Crim. Cas. 91), *R. v. Mansell* (27 L. J. 4, Mag. Cas.), *R. v. Mellor* (7 Cox Crim. Cas. 454), *R. v. Winsor* (10 Cox Crim. Cas. 276), and *Leverson v. The Queen* (11 Cox Crim. Cas. 286).

Sir R. Palmer, replied.

*Cur. adv. vult.*



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Judgment was delivered by Sir W. ERLE.—Upon this appeal it appears by the proceedings returned to this Court that the prisoner Murphy was tried for murder at a session of oyer and terminer and gaol delivery for the month of September, before Mr. Justice Faucett, and was convicted and sentenced; and all the proceedings, as far as appeared, were regular in due form of law. Afterwards, an application on behalf of the prisoner upon an affidavit was made to the Supreme Court sitting in banco, in term, for a rule to show cause why a *venire de novo* should not issue for the trial of the said prisoner, and, upon further affidavits, the said rule was made absolute; and therein it was also ordered that a suggestion should be made on the record to the effect that after the jury had been empannelled, and before verdict, the jurors were allowed, during certain adjournments of the court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order, that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come. It farther appears by the same proceedings above referred to that the only affidavit giving judicial knowledge to the Supreme Court of the alleged irregularity in keeping the jurors was that of the attorney for the prisoner, who deposed “that he was informed by one of the jurors who acted on the said trial, and he verily believed, that after they had been empannelled to try the said case, and during their confinement at the hotel (where they were kept during adjournments), and before verdict, the jurors were allowed the free use of the newspapers of the day which contained reports of the aforesaid trial as far as it had gone; in one of which newspapers the heading given was the ‘South Creek Murder Case.’” These are the proceedings in the courts below to which we think it necessary to advert as relevant to this appeal. Upon the argument in this Court the question has been whether the above-mentioned order for vacating the judgment upon the verdict and for a *venire de novo* in order for another trial was valid, and their Lordships have come to the conclusion that the answer should be in the negative, both on the ground which their Lordships relied upon in the case of *Reg. v. Bertrand* (10 Cox Crim. Cas. 618), and also on the further grounds stated below—1st. Their Lordships consider that the present case is in substance an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. In *Bertrand’s case* the irregularity was, that the



evidence of the witnesses was read to the jury from the notes of the evidence on a former trial. Here the irregularity was in so keeping the jury during the course of the trial, as that the jury-men may have had access to some newspapers during that time; but the law is clear that the discretionary power vested in certain courts and cases to grant new trials does not extend to cases of felony. The law on this subject was declared by their Lordships in that case, and we consider that the law so declared governs the present case. Each of these cases falls within the rule that no person ought to be put in peril twice on the same charge. The application of the rule is shown in detail by Blackburn, J., in *R. v. Winsor* (10 Cox Crim. Cas. 276), who there states, "When the jury have been brought together, and the prisoner has been given in charge, and the trial has commenced, the right course, if practicable, is that the jury should give their verdict convicting or acquitting the prisoner. When the jury have once found a verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial." He further shows that a *venire de novo* on the same indictment would be erroneous, and a new indictment on the same charge would be defeated by a plea of *autrefois acquit* or *convict*. These remarks relate to a verdict returned upon a good indictment for felony before a competent tribunal. Their Lordships cite this statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good, and the prisoner has been given in charge to a jury, in due form of law empannelled, chosen, and sworn, and a verdict of conviction or acquittal has been returned. In the present case, if the prisoner should have been tried and convicted upon the *venire de novo* ordered to issue by the rule here appealed against, according to the passage just cited, a judgment thereon would be erroneous. The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place, or person—cases of verdicts so insufficiently expressed or so ambiguous, that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory. As to the two supposed exceptions to this rule against new trial in cases of felony, *R. v. Scaife* (17 Q. B. 238) was noticed in *R. v. Bertrand*, and the other case of *R. v. Fowler and Johnson* (4 Barn. & Ald.) was explained to be no decision in the course of the argument on this appeal. Secondly, the farther grounds for sustaining the present appeal beyond those expressed in the judgment in *Bertrand's case* relate both to the form of the proceeding in the Supreme Court when exercising appellate jurisdiction under which the rule appealed against was granted, and also to the sufficiency of the

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evidence on which that court acted in granting that rule. Their Lordships are not aware of any principle either of the law of England or of this colony by virtue whereof the Supreme Court, sitting in banco in term, could take cognisance as a court of appeal of the judgment pronounced by Faucett, J., at the session of oyer and terminer, which had come to an end before the session in banco began; and although the relation of the courts to each other in respect of appellate jurisdiction has not been ascertained by us with precision, still, whatever be that relation, we find no form of proceeding analogous to that which is required by the common law in proceedings when the aid of a court of error or appeal is invoked, but the form is the form adapted to an application to the discretion of the court for a new trial. Then as to the sufficiency of the evidence of the facts on which the court acted in granting the rule appealed against, their Lordships do not find any strictly legal evidence of any fact; they find nothing beyond an affidavit of mere hearsay information, obtained from a person who had been on the jury, but was then discharged; and this information, if admitted to judicial notice at all, showed possible access to newspapers, without showing that they contained matter which tended to influence the jury improperly, or that the jury ever did, as a matter of fact, read the newspapers. There is also the further objection that the supposed informant had been one of the jurymen, and the courts here have at times expressed a reluctance which we consider salutary against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach the verdict. The whole of the proceedings in the Supreme Court are referred to the Judicial Committee, and as their Lordships consider that the rule *nisi* for a new trial, and the rule absolute founded thereon, were each granted on insufficient grounds, both rules fail to produce any effect, and the conviction stands unimpeached thereby. We do not examine the authorities cited for the respondent, because none of them appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to show that the verdict had actually resulted from improper influence, and we refer to the special verdict reported in 11 H. 4, f. 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict. The case in the Year Book (11 H. 4, f. 17), we translate as follows:—  
“The plaintiff in an assize had delivered an escrowment [writing to be used in case of need?] to a jurymen on the panell, for evidence of his matter; and after the same juror, with others, had been sworn, and put into a house to agree on their verdict, he showed the writing to his companions, and the officer who kept the enquest showed this matter to the court, through which the justices took the writing from the jurors, and took their

verdict ; and by the examining ("per l'apposale") of the jurors the time of the delivery of the writing was inquired into, and it was found (*i.e.*, by the jurors) to be as above stated ; and as the verdict was for the plaintiff, now he prayed judgment. Gascoigne and Hull said that the jury, after that they were sworn, ought not to see or carry with them any evidence, except that which was delivered to them by the court, and by the party put in court as the evidence shown ; and inasmuch as they did the contrary, the plaintiff ought not to have judgment" This case, with the words of Gascoigne and Hull, has been frequently referred to in abridgments and treatises by Brooke, Rolle, Hale, Viner, and others ; but the general words of those judges, as well as of judges in general, are to be limited in some degree by reference to the facts of the case in respect of which they were spoken, and the issue of this case is not altered by transcription. We take one reference to this case, as an example, from Bro. Ab. "Gen. Issue," p. 85, thus :—"After stating that an enquest must not take evidence privily, he adds, 'Et par Gascoigne et Hull s'ils preignent escrowe extra curiam et passent pur le plaintiff, si ceo appiert sur examination par le court, ceo est cause d'arrester le jugement :'" (11 H. 4, f. 17.) So that the result of the examination, viz., that the verdict was not "according to the evidence," but upon evidence taken out of court, from one party without the assent of the other, appeared by the finding of the jury, and was upon the record, as Brooke understands the case, or the judgment could not have been arrested. The special verdict here reported may be contrasted with the suggestion in the present case. In the case (11 H. 4, f. 17), the court which had jurisdiction both to try the suit and to arrest the judgment ascertained the fact of the misconduct of the plaintiff by examining the jurors, while acting as jurors, and by their verdict. Judicial knowledge from this source is in contrast with the affidavit above described. Also the interest of a plaintiff as a party may be contrasted with the supposed interest of the Queen (referred to in the judgment of the Chief Justice in the court below) in an indictment in which, although it runs in her name, she has no interest beyond that of truth and right. Neither is the sheriff her agent, as also there suggested ; he emanates from the people, and is neither appointed by, nor can be dismissed by, nor is he paid by, the Queen ; furthermore, the mere omission of his bailiffs to clear a room in an inn where jurors are confined, of the newspapers coming there by the course of the inn, is in contrast with the culpable craft of the plaintiff who prepared a statement of his case, and sought out a juryman into whom he probably infused a prejudice in his favour, and so influenced the verdict. In conclusion, their Lordships desire to add that they are sensible of the importance of guarding the channels for information through which the minds of the jury are led to their verdict, and concur with the learned judges of the court below in their zeal for the prevention of any such misconduct in future ; but they think that

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the court was wrong in granting a new trial as a remedy for this misconduct, and that the mischief would be greater if uncertainty was introduced respecting the course to be pursued in administering the law relating to charges of felony. If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence. As there was, in the opinion of the court below, irregularity in the trial of the respondent sufficient to vacate the judgment, their Lordships have no doubt that, upon proper application on behalf of the respondent, which they recommend to be made, such weight will be given to these remarks as they may appear to deserve. But, as between the appellant and respondent, their Lordships will advise Her Majesty that the appeal should be sustained without costs, and that the order for a new trial should be reversed.

*Judgment reversed.*

## NORFOLK CIRCUIT.

CAMBRIDGE SUMMER ASSIZES.

(Before Mr. Justice BYLES.)

*July 30 and 31, 1869.*

REG. v. CASBOLT.

*Night poaching—Limitation of proceedings—9 Geo. 4, c. 69, s. 4.*

*J. O. was indicted for night poaching on the 6th of February, 1863. He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, and to move in arrest of judgment, upon the ground that the proceedings against him had not been commenced within twelve calendar months, as directed by the 4th section of 9 Geo. 4, c. 69.*

*Held (per Byles, J.), that the application to withdraw the plea was one which ought to be granted, and that, as no warrant and information was produced showing that proceedings had been commenced within twelve months, the objection was fatal.*

*Quære, at what time during the trial ought such an objection to be taken?*

**T**HE prisoner, James Casbolt, who, when taken into custody, was in the Metropolitan police, pleaded guilty to an indictment, under 9 Geo. 4, charging him with night poaching on the 6th of February, 1863. A bill had been sent up for an attempt to murder the gamekeeper, James Tikbrooke, but was thrown out by the grand jury, a true bill being found for night poaching.

*Mills* for the prosecution.

*Naylor* for the defence.

*Naylor* applied for leave for the prisoner to withdraw his plea of guilty, in order that he might move an arrest of judgment upon the ground that no proceedings had been taken within twelve calendar months, as directed by sect. 4 of 9 Geo. 4, c. 69. He quoted *Reg. v. Kilminster* (7 C. & P. 228).

*Mills, contra*, quoted *Reg. v. Austin* (1 C. & K. 621). [BYLES, J.—That does not help you.] The prisoner was apprehended on

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the 19th of July, 1869, on the original warrant granted in 1863. [BYLES, J.—Was that warrant served on the prisoner within twelve months of the commission of the original offence?] No.

*Naylor.*—It is not only necessary that the warrant should be served, but the information sworn.

*Mills.*—No notice has been given of this application. The prisoner was included in the original information.

BYLES, J.—Where is the original indictment?

The Clerk of the Assize.—At London.

BYLES, J.—There is no evidence of any prosecution having been commenced except the finding of the indictment yesterday.

*Mills.*—Unfortunately through the prisoner pleading guilty we had no chance of giving evidence. Perhaps your Lordship will reserve the point for the Court of Crown Cases Reserved? [BYLES, J.—No.] If there was an adjournment I could produce evidence. [BYLES, J.—I rather think, from circumstances which have come to my knowledge, that this defence is not contrary to the ends of public justice. I shall give the prisoner an opportunity of withdrawing his plea.] The point to be decided was whether the warrant being obtained was not the commencement of the proceedings.

BYLES, J.—The answer to that is that it is not, unless it is served. The case of *Reg. v. Hull* (2 F. & F. 16) is exactly in point.

*Naylor.*—The warrant contained no reference to night poaching at all.

*Mills.*—The shooting at Tikbrooke was part of the occurrence.

BYLES, J.—I will look over the cases, and hear further arguments to morrow morning.

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July 31.

*Mills.*—This is a motion in arrest of judgment.

*Naylor.*—No; it is for permission to withdraw a plea.

*Mills.*—It is in arrest of judgment. [BYLES, J.—Even if that were so, I should allow the prisoner to withdraw his plea to meet the real merits of the case. My impression is, that it is a good defence upon the general issue.] We had no notice of this motion, and, therefore, when the prisoner pleaded guilty, sent all our witnesses away, and it is impossible to get them here. [BYLES, J.—If you had no witnesses you might be prepared to meet this case. This is a case in which the point now before us is documentary. What is wanted is the warrant and indictment.]

*Naylor.*—And the information.

*Mills.*—I can produce the warrant, but not the information; that is at Saffron Walden. [The warrant was produced.]

BYLES, J.—This is a warrant for felonious shooting; it is for a different offence. This is not the offence with which the prisoner is charged.

*Mills.*—The question was, did not the present charge arise out



of the offence alleged in the warrant? [BYLES, J.—This warrant clearly does not show the prosecution commenced at the right time.]

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*Mills* quoted in support of his view *Reg. v. Brooks* (2 C. & K. 402), and *Reg. v. Austin* (1 C. & K. 621).

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*Naylor* relied on *Reg. v. Hull* (2 F. & F. 16) and *Reg. v. Parker* (8 Cox Crim. Cas. 465).

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—Practice.

BYLES, J.—It is no use going into this case; the offence was committed six years ago. I am of opinion that this is a good defence both on principle and authority; upon principle, because the statute says that the criminal proceedings must be commenced within a certain date—twelve months. I have no information here that any criminal proceedings for this offence were commenced within twelve months; on the contrary, as far as I can judge from the warrant which has been produced it was for a different offence. We may fairly assume that the information, if there was one, was for the same offence as that stated on the warrant. The information is not produced, therefore we may draw any inference. With respect to the time when this objection was taken, in the cases cited, I do not know, but suppose at the same period as has been taken in this case. That being so, and the prosecution being too late, I have in one sense no jurisdiction to try the prisoner, and must direct the jury that there is no evidence to find the prisoner guilty; and, as there are only two courses open to them, their duty will be to find him not guilty.

The jury was then sworn, the prisoner given in charge, and he was found

*Not guilty.*

## HOME CIRCUIT.

## KENT SPRING ASSIZES.

*Maidstone, March 8, 1870.*

(Before Mr. Justice KEATING.)

REG. v. HARWOOD.(a)

*The Habitual Criminals Act (32 & 33 Vict. c. 99), s. 11—Receiving stolen goods—Bank-notes—Evidence of guilty receipt—Previous conviction—Recent possession.*

*First. On an indictment for stealing a bank-note and receiving it, knowing it to have been stolen, quære, whether the 11th section of the Habitual Criminals Act applies, bank-notes not being goods?*

*Secondly. Assuming the enactment to apply, quære, whether it applies where the note was not found in the possession of the prisoner when he was arrested or charged with the offence?*

*Thirdly. Assuming that the enactment might apply in such a case, quære, whether it applies in a case where there is a count for stealing the note and not merely for receiving it?*

*Fourthly. The enactment, in case of a previous conviction, has not the effect of throwing upon the prisoner to prove that when he received the note he did not know it to have been stolen, there being no words to that effect in the operative part of the clause.*

THE prisoner was indicted for stealing a bank-note, and on another count for receiving it, knowing it to have been stolen.

*Norman* for the prosecution.

*Poland* for the defence.

On the 7th of October, 1869, the prosecutor lost the bank-note in question on a race-course. On the 9th the prisoner passed it at a place where he was known, putting his name on it. On its being traced to him, he was asked when he had it, and he said he had it at the races, from a man named Ferris, who, in consequence of this information, was discovered and convicted, the prisoner (while on bail) being a witness against him. Subsequently, how-

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

ever, the prisoner was charged with having feloniously received the note; but the indictment contained a count for stealing it.

It was proposed, on the part of the prosecution, to put in evidence, under the Habitual Criminals Act (a), a previous conviction of the prisoner for larceny in 1853.

*Poland*, for the prisoner, objected upon two grounds. First, the enactment only applied to cases of "stolen goods;" and bank-notes were not "goods." If they were, there would have been no necessity for special statutable enactments as to bank-notes or letters. Secondly, the enactment only applied in cases of goods "found in possession" of the prisoner, *i.e.*, at the time of his apprehension; otherwise the enactment might be applied five years after the original felony was committed.

*KEATING*, J., said he should, if necessary, reserve these points; and suggested a third (which also he would reserve), that possibly the enactment only applied where the indictment was only for feloniously receiving, and not where there was a count for stealing.

*Norman* submitted that the case clearly came within the spirit and object of the act; and as to the last objection, he offered to strike out the first count.

*Poland*, however, objected to this, and

The learned JUDGE said he did not think that such a course could be taken or would obviate the objection; and he should receive the conviction, but would reserve all the points.

A certificate of a conviction in 1853 of one Ward for larceny was then put in, and an officer proved that the prisoner was the person convicted. It was proved that due notice had been given to the prisoner.

This was the case for the prosecution.

*KEATING*, J., said there was no case upon either count of the indictment.

*Norman* submitted that the statute enacted that in such a case the prisoner was to be presumed to have known such goods to have been stolen until he had proved the contrary; but

*KEATING*, J., pointed out that it was *not* so worded. There are no such words in the clause. If there were, it would be a most stringent enactment, that on account of a conviction—it might be thirty years ago, when the prisoner was in his boyhood

(a) 32 & 33 Vict. c. 99, s. 11: "Where any person who either before or after the passing of this act has been previously convicted of any offence specified in the first schedule hereto [including any felony], and involving fraud or dishonesty, is found in the possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen; and in any proceedings that may be taken against him as receiver of stolen goods, or otherwise in relation to his having been found in possession of such goods, proof may be given of his previous conviction before evidence is given of his having been found in possession of such stolen goods; provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary." [It will be observed that, notwithstanding these latter words, there is no enactment that the conviction shall have such effect, the words to that effect having been struck out in the course of the bill through Parliament.—ED.]

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—he should be convicted of felony; for such probably would be the effect of putting him to prove that he did *not* know the goods to have been stolen. If there were such an enactment, of course it would be his duty to give effect to it; but happily, at present, there is *not* such an enactment, and he hoped there never would be, for it would be opposed to the great object of all criminal procedure, which is the reformation of the offender. If a man is to be taught that no length of time will suffice to enable him to recover his character, and that it can never be restored, the most powerful motive to reformation will be removed and the great object of all penal proceedings will be defeated. Such, at all events, is *not* the law; and there was no evidence, in his opinion, of a guilty receipt. Bank-notes pass like money, and the mere receipt of a stolen note is no proof of knowledge that it was stolen.

*Not guilty.*

## NORFOLK CIRCUIT.

LEICESTER SPRING ASSIZES.

March 3, 1870.

(Before Mr. Justice BYLES.)

REG. v. SARAH MCGINNES.(a)

*Uttering counterfeit coin—Husband and wife—Coercion of husband  
—Question for the jury.*

*Sarah McGinnes was indicted for uttering counterfeit coin. It appeared that at the time of the commission of the offence she was in company with a man who went by the same name, and who was convicted at the last assizes of the offence. When the prisoners were taken into custody the police constable addressed the female prisoner as the male prisoner's wife. The male prisoner denied the fact in the hearing and presence of the woman. Sarah McGinnes since her committal had been confined of a child :*

*Held (per Byles, J.), that under the circumstances, although the woman had not pleaded her coverture, and even although she had not asserted she was married to the male prisoner when he stated she was not his wife, it was a question for the jury whether, taking the birth of the child and the whole circumstances, there was not evidence of the marriage, and the jury thought there was, and acquitted her.*

**T**HE prisoner, Sarah McGinnes, was indicted for uttering and putting off to Sophia White, at Stapleton, on the 5th of November, 1869, a counterfeit sixpence, and upon the same day uttering a similar base coin to Hannah Chynick, at Cadeby.

*Hensman prosecuted.*

*The prisoner was undefended.*

The facts were as follows:—On the 5th of November, Sophia White and the landlady of the Nag's Head at Stapleton saw the prisoner and a man pass by with a truck; the prisoner came back

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

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for a pint of ale and tendered sixpence in payment, which proved counterfeit. A witness named Cobley watched the prisoner and the man, and saw the man rub the sixpence and give it to the prisoner, who went into the Nag's Head. Hannah Chynick, of Cadeby, proved that the female prisoner gave her a counterfeit sixpence in payment for some tobacco and matches. A police constable named Peberdy, apprehended the man and woman together. He told the man he wanted to speak to him, when he pulled a small white packet out of his pocket, threw it over the hedge, and ran away. The packet was subsequently found to contain thirty-eight counterfeit sixpences. When taken into custody, the prisoner Sarah McGinnes said she knew nothing about bad coin; the man said, "She is innocent of the charge;" but in the prisoner's presence and hearing said, "She is not my wife." The prisoner made no answer. The prisoner ought to have been tried at the last winter assizes when the man was convicted, but her trial was postponed in consequence of her confinement. It did not transpire in what name the child was baptized.

BYLES, J., to the jury.—There is no doubt the prisoner uttered these counterfeit coins, and had she been a stranger to the man, there would be no difficulty in convicting her. It is a matter of uncertainty whether the prisoner was married to the man or not. When the constable addressed her as the male prisoner's wife, he said "She is not my wife," and that being uttered in the woman's presence and hearing without any comment from her would, in an ordinary civil case, be strong evidence that she was not. But if she thought fit to hold her tongue, this being a criminal charge, her silence ought not to be construed so strictly against her. The prisoner had been delivered of a child, but there was no evidence one way or the other what name the child was known by. The man on each occasion of the uttering was sufficiently near to exercise coercion. There was no distinct evidence that the female prisoner was married, but her name was the same as the male prisoner. If they doubted the marriage, then they ought to convict the prisoner, but if, taking all the circumstances into consideration, they thought she was McGinnes's wife, then to acquit her.

*Not guilty.*



## SOUTH WALES CIRCUIT.

GLAMORGANSHIRE LENT ASSIZES, 1870.

(Before BOVILL, C.J.)

REG. v. DAVID JONES AND OTHERS.(a)

*Mutiny—Piracy—Confinement—Revolt—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, part 3, ss. 17, 18).*

*Where an indictment contains counts for offences within the Admiralty jurisdiction, and others for offences on the high seas, the prosecution will not be put to their election as to which set of counts they will proceed upon.*

*In an indictment for confining a captain of a ship, "constructive" confinement will satisfy the requirements of the statute, and this will be supported by evidence that, although no force was used, the captain was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel.*

*The Merchant Shipping Act (17 & 18 Vict. c. 104, part 3, ss. 17, 18) does not apply to cases where acts of violence towards the officers, and deprivation of the captain's command take place.*

THE prisoners were indicted under the 11 & 12 Will. 3, c. 7, ss. 7, 9, charging them in six counts with offences under that statute. The following is an abstract of the indictment:

*First count.*—The jurors on their oath present, that David Jones, late of the British ship *Vicksburg*, mariner; John Wright, late of the same ship, mariner; Alexander Hansen, &c., &c., being seamen, to wit, seamen lawfully engaged to serve, and serving on board the said British ship, with force and arms, to wit, on the 10th of January, 1870, on the high seas, feloniously did unlawfully and piratically make a revolt in the said ship against the form of the statute, &c.

*Second count.*—Same as first, leaving out the words "on the high seas."

*Third count.*—Same as the first down to the words "on the high seas," and then the words following, "feloniously did un-

(a) Reported by E. JULIAN DUNN, Esq., Barrister-at-Law.

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lawfully and piratically endeavour to make a revolt on the said ship, and so the jurors say that David Jones, John Wright, Alexander Hansen, &c., are pirates, felons, and robbers against the form, &c.”

*Fourth count.*—Same as the third, leaving out the words “on the high seas.”

*Fifth count.*—Same as the first down to the words “on the high seas,” and the words following, “feloniously did unlawfully and piratically confine their master, one David Mellor Thompson, being then, to wit, master of the said ship *Vicksburg*, and so the jurors say that the said David Jones, John Wright, &c., are severally pirates, felons, and robbers against the form of the statute, &c.”

*Sixth count.*—Same as the fifth, leaving out the words “on the high seas.”

*Bowen* and *Gwilym Williams*, instructed by *Reece*, for the prosecution.

*Coleridge* for the defence.

At the commencement of the case, the prisoner’s counsel contended that the prosecution should be put to their election, on which set of counts they would proceed, as the jurisdictions were different.

*BOVILL*, C.J., however, thought that the prosecution might proceed upon the whole of the indictment.

The chief facts detailed in the evidence were the following testimony of the captain :

David Mellor Thompson, sworn, said : I am master of the ship *Vicksburg*. The articles produced are a copy of the original articles. The agreement produced is the original, and contains the signatures of the ship’s crew. The articles are for a voyage from Newport to Bombay. I shipped a crew at Antwerp ; they all deserted, and the present crew were engaged in their place. On the 3rd of January the *Vicksburg* left Newport for Bombay, in tow of a steamer. The steamer towed me down to within three or four miles of Lundy Island. In the course of the afternoon the whole of the crew came and told me that the vessel was short-handed. There was one man short ; being twenty-three in the articles, all told, and twenty-two on board. Twenty-two are quite sufficient to work the ship, and this I told them. They went to their work. After the steam-tug left me I wanted the sails set. Three of the men were in bed, Martin, Barry, and Hansen. It was midnight. I and the first mate went to the fore-castle, and pulled these three men out of bed. The ship was in danger, and I wanted the sails set. The men came out to their work, and loosed the main-topsail and reefed it. I was on the poop-deck superintending the work, when I got a blow from behind, and on turning round I found it was Martin. I took him down into the cabin and handshackled him, and kept him in irons fifteen hours. I then liberated him, and he returned to duty. The crew continued to do their duty up to the 7th, when

the wind came on to blow, and I wanted all hands to shorten sail. I went forward with the chief officer, and there found Powell, Martin, and Loughlin. They said they were sick, and I told them to come aft, as there was a fire there. They came aft, and I gave them a dose of salts each, which the steward brought. Powell and Martin took the salts, but Loughlin struck the medicine out of my hand, saying he would not take it. I ordered the steward to fetch another dose, and I put the handshackles on him. He then took the salts, and they afterwards went to their work. On Sunday, January 9, in the morning, the whole of the prisoners and another able seaman named Vincent, came aft to me, and asked me to put the ship back into port. They said they were not able to work her. I said, "No, I am bound for Bombay." By that time some sails had been blown away. I told the men that there were plenty of sails on board to replace them. Our cross-jack-yard was broken. I said we had plenty of spars on board. The crew said they would not work. They then went to their berths, and remained till Sunday morning. The gale abated in the forenoon. In the afternoon, the officers, carpenter, sailmaker, and one able seaman, got out a new maintopsail, and bent it to the yard and set it. The next morning the same men and boys were setting the fore-topsail. I was in the cabin at the time. An apprentice came to me, and I went on deck. On getting on deck, I saw the prisoners coming along deck, armed with iron bolts, belaying pins, and pieces of wood. They came to the poop-deck. I was on the top, the men being down beneath, on the main deck. They asked me if I would put the ship back to port. I refused, and said I was bound to Bombay. At this time the ship was about forty-eight miles S.W. of Lundy Island. We could barely see the land on the English side, and were out of the Bristol Channel. They said if I did not turn the ship back they would pinion me down the same as they had done the officers, and take the ship back themselves. Wright, Barry, and George Clark were the principal spokesmen, all the other prisoners being there in a body. I had my loaded revolver in my hand, and I threatened to shoot them if they did not turn to their duty and release the officers. Barry opened his breast, and said, "Fire; you can only take one or two of us, and then the rest will do for you afterwards." When I saw the determination on their faces—that they did not care about dying—rather than shed blood I let them have their own way. They then sent a man to the helm, squared away the yards, and stood in for land. They told me to remain on the poop-deck, and, if I did not interfere with them, they would not hurt a hair of my head. Brown took the helm, and Wright and Barry took the principal direction of the ship. Soon after this a fishing smack passed us, and hailed us. I returned the hail, and said I was from Newport. Three of the prisoners came to me, and said if I opened my mouth to anyone they would confine me. The three men were Wright, Barry, and George Clark. We sighted Lundy at twelve

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Piracy.*

o'clock the same day. When near Lundy a signal was made for a pilot, and on the following day a pilot came on board. His name is George Summers. A pilot had previously come on board and left. When Summers came on board the officers were released, and came aft. I told the pilot I was master of the ship again, and my officers were free. I resumed my position as captain of the ship, and brought her into the Penarth Roads, the crew working and obeying the pilot's orders. I communicated with the shore. The Cardiff police came on board, and the prisoners were taken into custody.

Cross-examined by *Coleridge*.—I have had command of a vessel since 1846. When I gave the men in custody, I charged them under the Merchant Shipping Act. The crew worked cheerfully on the way back. I did not attempt to wear the vessel back as soon as I had command of her, nor to put any of the crew in irons. I did not consent to their taking charge of the ship; I said, rather than shed their blood, I would let them have their own way. When I had them confined to the forecastle I told them I would starve them out. They were nailed in, but the front was open, and they could have got out if they had chosen. I nailed them up to frighten them, and to get them to return to their work. They were confined for about twenty hours. The steward was confined. He went in of his own accord. None of the men complained to me that they had been on duty for forty hours, and were worn out. During the week I was on deck nearly the whole time. On Sunday was confined to my cabin with sickness and ague. The mate did not come to me to the cabin, and find me sick, with a bottle of brandy by my side; I did not ask him where the ship was. I was perfectly sober all the time, from the day the vessel left Newport till we returned to Cardiff. I am not subject to sea-sickness. I was not sea-sick when the mate says he came to me in the cabin. He did not come that I know of. If I was sea-sick then, I have been sea-sick for a number of years. I did not knock two of Martin's teeth out. He was not struck at all as far as I know. I cannot identify David Jones as being among the mutineers. I have heard that the *King Lear* went down with all hands the day I left Newport, but I do not know of my own knowledge.

Re-examined: I have been seventeen years in the service of my present employers. The *Vicksburg* carries 1400 tons, her registered tonnage being 1000 tons.

And the evidence of the other officers of the ship, viz.,

Charles Honyman, first mate, who said that the crew refused to do their duty on the 9th of January, that he was subsequently tied with a piece of rope by some of the prisoners, who suddenly came upon him from behind, and that the second mate and boatswain were also lashed in the same way. They were all confined; had their meals regularly, being separately untied, and allowed to eat, and then tied up again, and a guard set over them.

James Buchanan, the second mate, and William Morgan, the boatswain, gave corroborative evidence.

At the close of the case the prisoners' counsel submitted that the evidence did not support the two last counts of the indictment charging the prisoners with having confined the captain, they had only threatened him with confinement if he interfered with them; they had allowed him the use of his own state rooms, and there was no confinement within the statute.

BOVILL, C.J., ruled that there was clearly evidence of constructive confinement, the captain having been deprived of his lawful command, and being constrained to remain in a certain part of the vessel, and not at liberty to leave, this restraint being put upon him by the prisoners, by their presence and gestures.

It was further submitted the confinement, if it was confinement, was conditional and not absolute; and also that there was no evidence of such a revolt as was contemplated by the statute, which was highly penal, and the punishment severe. The endeavour here was to save the ship, and they offered the mate the command; the case could be dealt with under the Merchant Shipping Act (17 & 18 Vict. c. 104, part 3, ss. 7, 18).

BOVILL, C.J., said he would make a note of the first objection for further consideration if necessary; but held that, as to the other objection, the Merchant Shipping Act simply referred to cases in which there was a refusal to obey the lawful commands of the officers, but had no reference to acts of violence towards the officers of the ship, and taking the command out of the hands of the captain altogether.

Prisoners' counsel suggested that the contention was that the offence charged was not such an offence as comes within the meaning of the highly penal act under which they had been indicted.

BOVILL, C.J., said that he believed it was just the kind of offence with which the act was intended to deal.

No witnesses were called for the defence.

BOVILL, C.J., in summing up the case to the jury said: The ten prisoners at the bar are charged, under the three counts of the indictment, with having committed three several offences within this Act of Revolt. These matters, which are so charged, may, for your purposes, be considered as three separate charges. First, they are charged with making revolt on board the ship. Secondly, with endeavouring to make a revolt. Thirdly, with confining the master. The case has been treated by the learned counsel for the defence as if it were a very trivial one. It is a most serious one, affecting the commerce and the maritime interests of this country most deeply. The captain of a vessel is a person to whom the law entrusts the absolute command of the ship, and the Legislature has provided ample means for the protection of the mariners. In the present case, if the prisoners were aggrieved, it is to the law that they should have looked. It was their voluntary act to offer themselves for service on board the ship. When men embark on

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board vessels, they are bound to obey all orders of the captain with regard to the management of the ship, for he is despotic. The law having entrusted him with such power, it has always in this country been considered the most serious offence for seamen to rise in revolt against their captain. Once the offence was visited with capital punishment, and now it is still visited with severity, but at the discretion of the judge. However, your verdict ought not to be influenced by the nature of the punishment. In this case the first charge is, that of making a revolt in this ship. Now I can scarcely conceive a case stronger than where the management of the vessel is taken out of the hands of the captain and usurped by the crew. The vessel was on her voyage laden, and with an adequate crew on board. The question is, did the crew then take the command of the vessel out of the hands of the captain? Who put the ship about? Who brought her back to port? The captain did not do it, he only consented to the crew taking her back when he could no longer resist without bloodshed. It is not necessary to constitute a revolt that the crew should intend to take away the vessel and rob the owners of it. Then as to the confining the captain? It is not contended that any violence was offered to him. The striking spoken of by the captain has nothing to do with the revolt, for it was committed before the time charged in the indictment. But if you come to the conclusion that the captain was not a free agent to go where he liked on board the ship, then that was a confinement within the meaning of the law. D. Jones's name has been mentioned as having been confined by the captain; but the captain cannot speak with certainty as to his being present on the Monday, the 10th, and there is not evidence sufficient to show that he was there. As to the justification attempted to be set up, it cannot be sufficient that the sails were torn and the spars broken. The storm was over; there were new sails and new spars on board, there was a captain of seventeen years' experience, and there does not seem to have been any danger whatever. When the men refused to work, their punishment was in the discretion of the captain, and nailing them up without himself giving them food was not excessive. The difference between this case and one coming under the Merchant Shipping Act is, that this ship was taken out of the control of the captain, and there is therefore nothing improper or unusual in their being brought here on the criminal charge.

D. Jones was acquitted: the rest were found guilty on all the counts of the indictment, and sentenced to various terms of imprisonment.



## COURT OF QUEEN'S BENCH.

SITTINGS AFTER HILARY TERM, 1870.

(Before Mr. Justice HANNEN.)

REG. v. BURT. (a)

*Nuisance—Obstruction of footway—Nature of obstruction—Statutable authority—Reasonable time—Evidence.*

*On an indictment for a nuisance in a highway, by putting and keeping steps on the footpath on account of a difference of level, the defence set up being, an authority given by a local act to make certain alterations :*

*Held, that it was, nevertheless, a question for the jury whether, under all the circumstances, the alterations had been carried out with reasonable care. If what might have been excused as temporary had been kept up an unreasonable time the defence ceased :*

*Held, also, that the lapse of time, the nature of the obstruction, and the other circumstances attending it, were sufficient evidence as to the unreasonableness of the time.*

**I**NDICTMENT for obstruction of a highway. The first count stated that the defendant, on the 3rd of December, 1868, in a certain street, and the Queen's common highway, unlawfully and injuriously did put, place, and lay divers large quantities of dirt and other rubbish, soil, timber, and stones, in and upon the said street, and the same did keep and continue in and upon the said street to the great damage and common nuisance of the liege subjects passing along the same, &c.

*Second count.*—That the defendant unlawfully and injuriously did raise and heap up large quantities of earth, stone, and other materials in and upon the said highway, and caused to be erected stone steps thereon ; and the said steps did continue, and yet do continue, by means whereof the said highway was and is obstructed, &c.

*Keane, Q.C., and Hopwood, for the prosecution.*

*Giffard, Q.C., Poland, and Thesiger, for the defence.*

The alleged nuisance was originally caused in December, 1868.

(a) Reported by W. F. FIDLASON, Esq., Barrister-at-Law.

REG. The indictment was found at the sessions in May, 1869. It had  
 v. been removed by *certiorari*. The defendant was a contractor  
 BURR. employed by the city authorities, who acted under a local act.  
 — By the 10 & 11 Vict. c. 280 (an act of 1847 for effecting certain  
 1870. improvements in the City of London), s. 5, it was provided that  
 — it should be lawful for the corporation to cause such parts of the  
 Nuisance— streets to be laid out for carriage way, and such part for foot  
 Obstruction— passengers as they should think proper; and (sect. 6) that it should  
 Evidence. be lawful for them to alter, direct, stop up, or inclose all such  
 streets or ground as should be deemed necessary for the purposes  
 of the act; (sect. 8) that it should be lawful for them to raise or lower  
 the ground of any streets which should communicate with those  
 to be made. Then the Smithfield Market Act (23 & 24 Vict.  
 c. 193), provided that it should be lawful for them to widen and  
 improve Charterhouse-lane and Greenhill-street, and there was a  
 street which communicated between them, and this was the street  
 in which, in December, 1868, the alteration had been made, which  
 was the subject of the present indictment. The level had been  
 altered of the part just above the house of the prosecutor, a  
 publican; and two or three steps had been made in the footpath  
 just above his house, in order to avoid putting the lane in a hole,  
 which would have been the result of continuing the pathway  
 at its higher level. These steps were now complained of as  
 necessarily inconvenient and dangerous; and also as rendered  
 more so by reason of their being badly constructed of a soft  
 granite, easily worn and rendered slippery.

Skilled artisans, surveyors of pavements, and others acquainted  
 with the subject, were called to give their opinion that such steps  
 were dangerous, and these steps in particular. And evidence  
 was given of a number of accidents which had occurred at these  
 steps, one of which had terminated fatally, and others had led  
 to serious injuries.

*Keane* tendered, in support of the case for the prosecution,  
 a resolution of the local board that the steps were dangerous.

*Giffard* objected to the evidence as irrelevant and inadmissible.

HANNEN, J., rejected it as inadmissible. Some members of the  
 board must come here to give their evidence that it might be  
 seen what it was worth.

*Giffard*, at the close of the case for the prosecution, submitted  
 that, upon this indictment, there was, upon the facts, and under the  
 statutes, no case. The indictment was not for negligently doing  
 the act, but for the act itself, as an absolute obstruction. The  
 mere act itself was complained of, quite apart from any negligence  
 in the doing it and the manner of doing it; and the act itself  
 was expressly authorised by the statute, especially by the 8th  
 section.

*Keane*, *contra*, contended that the corporation were authorised  
 to do what they did only with reasonable care, and so as not to  
 cause unnecessary danger. As the evidence showed that it was  
 so done as to cause great danger, it was not authorised.

*Giffard* in reply. The steps being thus placed render the pathway reasonably safe, though perhaps not quite so convenient as a mere gradient.

HANNEN, J.—It is a question of degree, and therefore for the jury to consider whether what was done was done reasonably.

*Keane* objected that there was no evidence that the acts were done by the authority of the corporation.

The city architect was then called, and proved that in his office and capacity his duty was to superintend such works, and that he had directed what had been done in this case, which, he said, was done with reference to what was believed to be the general convenience.

HANNEN, J., to the jury.—The question for you is whether the work was an obstruction, and whether under all the circumstances the defendant adopted the most reasonable and most convenient mode of conducting the alterations. If not, then he was not justified by the statutory authority set up.

*Guilty.*(a)

(a) *Giffard* moved, in Easter Term, on the ground that what had been done was justified by the statute, at least, temporarily, and that there was no evidence that the steps had been kept up an unreasonable time. But the court thought that the lapse of time and the nature of the obstruction were circumstances from which the jury might infer the unreasonableness of the time, and they therefore refused a rule to set aside the verdict.

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## NORTHERN CIRCUIT.

LIVERPOOL WINTER ASSIZES.

*December 17, 1869.*

(Before Mr. Baron MARTIN.)

REG. v. GRIFFIN. (a)

*Manslaughter—Correction of child by father.*

*An infant, two years and a half old, is not capable of appreciating correction, a father therefore is not justified in correcting it, and if the infant dies owing to such correction, the father is guilty of manslaughter.*

THE prisoner, David Griffin, was indicted for the manslaughter of Ann Griffin, at Liverpool, on the 7th of November, 1869. *Tidswell* for the prosecution.

*Hawthorne* for the defence.

The deceased, who was the daughter of the prisoner, was two years and six months old, and her death took place under the following circumstances.

On the 7th of November the prisoner's wife had occasion to leave the house, the deceased, with her brother and sister, being at that time in bed, in a room adjoining that in which the prisoner was sitting. During the absence of his wife, the prisoner heard the deceased crying, and went into the room where the deceased was, and took her out of bed into another room. As he was doing this she committed some childish fault; this made the prisoner angry; and, after having placed her in the other room, he got a strap one inch wide and eighteen inches long and, having turned up her clothes, gave her from six to twelve severe strokes over the lower part of the back and right thigh. Deceased did not cry much at the time, but appeared very frightened; she never recovered from the effects, and died on the following Wednesday, November 10.

Medical evidence was given to the effect that the deceased had been a healthy child and well nourished, and that the cause

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

of death was congestion, accelerated by a shock to the nervous system, produced by the severe beating which the prisoner had given it, the marks of which were clearly seen at the *post-mortem* examination on the day following her death.

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*Hawthorne*, for the prisoner, contended that there was no case to go to the jury, for the prisoner had, as a father, a perfect right to correct his child. *Manslaughter.*

*Tidswell*, for the prosecution, contended that, although a father might correct his child, the law did not permit him to use a weapon improper for the purpose of correction. He cited *Reg. v. Hopley* (2 F. & F. 201).

MARTIN, B. (after having consulted with Willes, J., who concurred in his opinion).—The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner.

*Guilty.*

## NORTHERN CIRCUIT.

## MANCHESTER WINTER ASSIZES.

*December 12, 1869.*

(Before Mr. Justice WILLES.)

REG. v. LEWIS AND OTHERS. (a)

*Mock auction—False representation—Conspiracy—Evidence.*

*A mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offence at common law; and persons aiding or abetting such a proceeding may be indicted for a conspiracy with intent to defraud.*

*Reg. v. Levine (10 Cox Crim. Cas.) explained.*

THOMAS LEWIS, Daniel Evans, James Lewis Harding, and Thomas Cartwright, were charged with having, at Manchester, on September 30, 1869, unlawfully conspired, combined, and confederated and agreed together, by divers false pretences and subtle devices, falsely and fraudulently to acquire and obtain from Edward Brown certain moneys, with intent to defraud him of the same. There was another count of the same kind in the indictment, charging them with having obtained money from Thomas Jones.

There was also a count for false pretences.

*Leresche* for the prosecution.

*Cottingham* and *Addison* for the defence.

From the opening of the counsel for the prosecution, it appeared that about three months ago the prisoners, accompanied by several women, and one or two other men not in custody, came to Manchester. They engaged a person of the name of Jennings to act as their master or principal, and he hired a shop at 99, Market-street, which they commenced to use as an apparent auction room, and at which articles of various kinds were disposed of. An auctioneer's box was placed at one end of the shop;

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.



announcements were made about a sale going on, and everything was done to induce the public to believe that ordinary and legitimate transactions were proceeding inside. A number of persons, including some of the prisoners and their associates, were ranged about the room, so as to give it the appearance of a little crowd being present at the auction, and there was no doubt that this was a sort of playacting upon the part of these persons to make others believe that they were bidders. In this way unwary strangers were attracted to look on the auction as genuine, and thus, upon several occasions, were induced to become bidders, supposing that a genuine competition was going on. The moment a stranger made a bid for any article it was knocked down to him, and he found himself burdened with some goods which, though nominally corresponding with the description given of them, in reality were nothing of the kind, being only vamped up, and different in quality in every respect. In point of fact, these persons had conspired together for the purpose of carrying out this false representation in order to delude the public into purchasing articles at a price grossly above their value. Among other persons who went to the shop were the prosecutors, Edward Brown and Thomas Jones. Mr. Jones became the purchaser of an electro-plated service, consisting of 25 pieces, for which he was to pay £8. A warranty was given to him that the articles were silver-plated, and that the gold lining of a cream jug was 18-carat gold. It afterwards turned out that the articles were not at all worth this price; that, in fact, they were articles which had been made for the purpose of deception. Mr. Brown, in a similar way, became the purchaser of a gold watch, which was said to be 18-carat gold, and a quantity of electro-plated goods.

WILLES, J., said, there could be no doubt that if the prosecution could prove what had been opened, a mock auction was an offence against the common law. It was clear that if a number of persons set up an auction for sale of articles of inferior value, having people present who pretended to bid, and thereby induced "yokels" to buy, they were engaged in an offence against the law. He thought it was for the prosecution to prove that these persons conspired together to carry on a mock auction, and if they failed to do that, the prisoners must be acquitted.

*Cottingham* asked if his Lordship confined the prosecution to the charge of conspiracy?

WILLES, J., said the prosecution might have to go into other charges so as to prove the conspiracy.

Witnesses were then called for the prosecution.

Inspector Henderson said: About three months ago, the prisoners and several other persons opened the shop, 99, Market-street, as an auction room. Alexander Jennings was the proprietor; Lewis acted as auctioneer; Harding as doorkeeper and "look-out;" Evans as porter, and sometimes took Harding's place; and Cartwright as a bidder, and one of the audience. Other persons, including the wives of Jennings, Evans, and Harding, also acted

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*Mock auction*  
— *Conspiracy*  
— *Evidence.*

as customers. He had watched the shop, and had observed that an apparent auction had been carried on. He had seen a stranger, and sometimes two, but not more at one time, go into the shop. A board was placed at the shop door stating that the sale was going on. From what witness heard from the prosecutor Thomas Jones, he went with him to the shop in Market-street on the 12th of October last. There were three women, and the prisoners, Harding and Evans, there. The woman told Jones that if there was anything wrong with regard to his purchase he should have his money back. Witness asked where the goods were, and Harding said they were not in the shop. Ultimately, the goods were produced, and taken away to be valued by Mr. Mitchell. The goods were afterwards returned to the prisoner's shop. He produced a quantity of electro-plated goods which he had received from Mr. Brown.

Thomas Jones, grocer, Dunkinfield, was next called, and deposed to his going to the auction on the 12th of October. Lewis was acting as auctioneer, and a lot of plated goods, which the auctioneer said were worth 18*l.*, were knocked down to a little man; whereupon the auctioneer said the little man was a Jew, and should not have the lot, they must be put up again. The goods were put up again, and the prisoner Cartwright bid for them. The bid got up to 7*l.* 18*s.*, and the auctioneer then asked the witness to bid 8*l.* for him. They were then knocked down to him, and the auctioneer told him he must pay for them. He told Lewis that he had not sufficient money to pay, and he said the witness must leave something on the goods. He left a sovereign upon them. The goods were then packed up, and Harding left the shop with the witness for the purpose of getting the money. He told Harding that he would have the goods valued before he paid him the money; but Harding refused to go with him to a jeweller's in Market-street to have the goods valued. Ultimately they went together to Mr. Williamson's shop in Welbeck-street, who examined the goods, and said they were not worth more than from 4*l.* 5*s.* to 4*l.* 10*s.* Harding then took the goods away, and witness went to the detective office, and there saw Inspector Henderson. Henderson and he went to the prisoner's shop, and they found Harding, Evans, and three women there, whom he had previously seen at the shop when he purchased the goods. One of the women said to him, "I suppose you want your money," and he said he did, whereupon he received a sovereign back.

Cross-examined: Harding would not allow him to take the articles to be valued at a silversmith's in Market-street. He asked for a warranty of the goods, and a warranty was given that the lining of the cream jug was 18-carat gold.

Edward Brown, merchant, carrying on business in Manchester, said: About the latter end of September he was in Market-street, and saw the auction going on at No. 99. When he went to the shop door the prisoner Harding said the sale was over, but the

prisoner Lewis, who acted as auctioneer, spoke from the inside of the shop, and said, "Come in; it's not over yet." Witness went in, and saw Evans handing articles about, and Cartwright was there. A lot of plated goods were put up, and Lewis asked witness to bid, as the goods were worth a great deal more than would be paid for them. Witness bid 10*l.*, and the goods were knocked down to him. A gold watch, which the auctioneer said was 18-carat gold, was then put up and knocked down to a person in the room; but the auctioneer said the man should not have it, as he was a dealer. The man offered the witness 2*l.* to bid for the watch for him, and upon the witness bidding 13*l.* 15*s.* for the watch, it was immediately knocked down. The witness had the watch valued at Mr. Bruce's in St. Ann's-street, who said it was worth only 8*l.* 10*s.* Witness took the watch back to the shop, and after some hesitation Lewis returned him 13*l.* 5*s.*, retaining 10*s.* for commission. The witness kept the electro-plated goods for about six weeks, and it was not until he saw the report of the proceedings against the prisoners in the newspapers that he suspected their quality. He at once communicated with the police, who had the goods valued.

William Mitchell, auctioneer, Manchester, said he had examined the goods sold to Jones, and valued them at 4*l.* 13*s.* 6*d.* That would give a profit on the trade price of 25 per cent. The goods which had been sold to Brown for 10*l.* he valued at 4*l.* 8*s.* 6*d.* The class of goods were the lowest he had ever seen. He did not believe such goods could be purchased in any shop in Manchester.

Mr. Bruce, jeweller, valued the 10*l.* lot of plated articles at 5*l.* 0*s.* 6*d.*

William Williamson, auctioneer, Welbeck-street, spoke to Mr. Jones taking the plated articles to him on the 12th of October. He valued the goods produced (Brown's lot) at 5*l.* 8*s.* 6*d.*

This was the case for the prosecution.

*Cottingham*, for the defence, submitted that there was no case made out against the prisoners to go to the jury. With regard to the false pretences—admitting everything as to the misrepresentation to have been proved—it was only a misrepresentation of value, and not of specie; and that, he submitted, was not sufficient to constitute a criminal fraud. It was merely a puffing and exaggeration of the value of the goods, and unless the party who purchased was defrauded as to the specie or description of the article, the mere difference in value did not constitute a criminal offence, and was not even an actionable fraud. This was laid down in the case of *Reg. v. Bryan* (7 Cox Crim. Cas. 312). The next question was whether there had been sufficient fraud to support a charge of conspiracy. He quoted a case of *Reg. v. Levine* (10 Cox Crim. Cas. 374), in which it was stated the defendant had sold electro-plated goods for 7*l.* on the representation that they were worth 20*l.*, whereas they were only worth 30*s.* The Common Serjeant of London, after consulting

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—*Conspiracy*  
—*Evidence.*

the Recorder of London, held that there was no false pretence or conspiracy.

WILLES, J., said he would not stop the case, although he thought the decision which Mr. Cottingham had quoted was entitled to the highest respect. He should, however, consider whether he would reserve the case for a superior court, in the event of the jury finding a verdict against the prisoners.

*Cottingham.*—Do you think there is any evidence to support the count of false pretences?

WILLES, J., said he thought not. The case of *Reg. v. Bryan* settled the question of false pretences. He should tell the jury that they could not convict in this case unless they were satisfied that more than one of the prisoners did get up this mock auction and sham representation, and that when a person went into the shop they made bids, which were sham bids, so as to get a higher price than would otherwise have been bid.

WILLES, J., in summing up, said, the questions for the jury to consider before they could find the prisoners guilty of conspiracy, were: Did the prisoners conspire together to defraud persons who might go in to bid by putting off goods at prices grossly higher than they knew they were worth, by employing sham bidders to run up the prices and entrap *bonâ fide* purchasers into the belief that they were bidding at a real auction, and so to buy under the belief that the bidders were real? Did they falsely and fraudulently represent that the goods were worth more than their real value? Did they make a trade of selling at a mock auction by fraudulently running up prices against *bonâ fide* purchasers by apparent bidders, whom the purchasers believed to be real? Did they conspire to defraud Jones, and to defraud him by those means; inducing him to purchase goods at much more than their value? And the same question as to the prosecutor Brown. It was competent for the jury to find some of the prisoners guilty and to acquit the others.

Lewis, Harding, Cartwright, *Guilty*; Evans, *Not guilty*.

WILLES, J.—Are you of opinion that the conspiracy was to defraud people generally?

The Foreman of the jury: Yes.

WILLES, J.—Do you find that the conspiracy was to defraud Jones and Brown?

The Foreman: Yes.

WILLES, J.—You find it was a mock auction, with sham bidders, who pretended to be real bidders, for the purpose of selling goods at prices grossly above their worth?

The Foreman: Yes.

WILLES, J.—And that that was done for the purpose of fraud?

The Foreman: Yes.

WILLES, J., said he would take time to consider the points raised before he passed sentence.

WILLES, J. (in passing sentence).—It had been insisted, on behalf of the prisoners, that it had been decided in point of law

that that which by common sense was obviously a scandalous and fraudulent mode of dealing, and damaging to fair trade, as well as being the means of deceiving those who were purchasers, was yet within the limits of the law, which did not deal with mere exaggeration and puffing.. Reliance had been placed on a decision in the case of *Reg. v. Bryan*, in which a man had pledged a large quantity of electro-plate under the false pretence that it was Elkington's "A" of the first quality. The jury convicted; and on the case coming before the Superior Court Baron Bramwell and himself held that the man had been convicted properly of false pretences, as he had been guilty of a "specie" fraud. The majority of the judges, however, thought that the case did not come within the charge of false pretences, and Bryan escaped. A subsequent case had come before the Common Serjeant of London, where there was an indictment for conspiracy for selling plated goods, in a similar way, at a mock auction carried on in London. The Common Serjeant, after consulting with the Recorder, held that there was no case. Had it turned out that these two learned authorities had held that mock auctions were within the limits of the law—though he would have differed from them, believing directly to the contrary—he would have reserved this case for the consideration of the judges. But no such point as the one involved in this case was raised; there was no decision that a conspiracy to do an illegal act was not an offence against the law. To employ puffers at a real auction, by the statute of 1867 had always been held to be legal in the courts of common law, and to employ apparent puffers and bidders, at a mock auction, for the purpose of fraud, and to obtain grossly higher prices than the real value of the goods, out of people deceived into the idea of imagining that they were real bidders, necessarily made the offence an illegal act. He should not leave this case without advising fraudulent persons—who were disposed, by the decision in the case of *Reg. v. Bryan*, to endeavour to play hide and seek with the law—to refer to the case of *Reg. v. Suter*, reported in the same volume as *Reg. v. Levine* (10 Cox Crim. Cas. 577), where it was held that, though the exaggeration of quality would not come within the Statute of False Pretences, yet, where a person added to his exaggeration the fraudulent statement that something was a genuine goldsmith's mark when it was not so, that was a false pretence, and came within the provisions of the law. Therefore, let all people who were disposed to commit such an offence as fell within this class, lay it to heart that, so long as they only exaggerated, they were safe; but let them take care they did not slip into "specie" misrepresentation, for so soon as they did so the criminal law would punish them for their conduct. He had not acted in this case on his own opinion, for he had carefully considered it with Baron Martin, who was clearly of opinion that a mock auction was an offence against the law. Baron Martin had mentioned a case to him in which something had happened

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1869.

Mock auction  
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—Evidence.

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LEWIS.  
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1869.

*Mock auction*  
—*Conspiracy*  
—*Evidence.*

to a woman very much like what had happened in the prosecutor Jones's case. The woman went into an auction to look on; goods were knocked down to her for which she had not bid; and she was compelled, under fear, to pay a deposit on them. The opinion of the judges on this case was, that it was an offence against the law, and, what was better, it was held to be a larceny, and the woman had been robbed. Baron Martin was clearly of opinion that if the offence had been proved he would be wrong if he reserved the case for the opinion of the judges in the Superior Court. He agreed with the prisoner's counsel that the decision in the case of *Reg. v. Levine* had produced a wrong impression in people's minds; and he had no doubt, judging from the answer given to the police by Jennings, that the prisoners had fancied that they could escape from the law in consequence of this decision.

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## NORTHERN CIRCUIT.

LIVERPOOL SPRING ASSIZES.

March 23, 1870.

(Before Mr. Justice WILLES.)

REG. v. COCKCROFT.(a)

*Rape—Evidence.*

*Although you may cross-examine the prosecutrix as to particular acts of connection with other men, you may not, if she deny it, call witnesses to contradict her.*

*Reg. v. Robins (2 M. & Rob. 512) overruled.*

CHARLES COCKCROFT was charged with having committed a rape on Mary Jackson, at Newchurch, on November 19, 1869.

*Addison* for the prosecution.

*Torr* for the defence.

The prisoner was tried for this offence at the last assizes held at Liverpool, before Mr. Baron Martin, but the jury were not able to agree, and were consequently discharged without a verdict.

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.



*Torr* asked the prosecutrix whether she ever had connection before with other men; she declined to answer it. [WILLES, J.—The prosecutrix need not answer the question unless she likes.] He then proposed to call witnesses to prove particular acts of connection with the prosecutrix and other men, and cited *Reg. v. Robins* (2 M. & Rob. 512).

WILLES, J.—You may cross-examine the prosecutrix with respect to particular acts of connection with other men, but if she denies them you are bound by her answer. You may not call those men to contradict her; you may, however, examine her with respect to particular acts of connection with the prisoner, and if she denies them you may call witnesses to contradict her.

*Guilty.*

When the prisoner was tried at the winter assizes in 1869, before Mr. Baron Martin, the same points were raised by *Torr*, who called the attention of the learned judge to *Reg. v. Robins* (2 M. & Rob. 512). His Lordship, however, said he considered that the decision in the case cited was wrong, and so would not allow witnesses to be called to prove particular acts of connection between the prosecutrix and other men. His judgment, therefore, agrees with that of Mr. Justice Willes.

REG.  
v.  
COCKROFT.  
—  
1870.  
—  
Rape—  
Evidence.

## NORTHERN CIRCUIT.

MANCHESTER SPRING ASSIZES.

March 8, 1870.

(Before Mr. Justice BRETT.)

REG. v. GREENSLADE.<sup>(a)</sup>*Evidence—Witness not in depositions.*

*A witness, whose evidence is relevant, may be called by the prosecution, although he has not been before the magistrates and although his name and the substance of his evidence has not been given to the prisoner or his attorney.*

*Reg. v. Pietro Stiginani (10 Cox Crim. Cas.) overruled.*

JOHN HENRY GREENSLADE was charged with having, at Heap, on the 10th of February last, forged and uttered a certain receipt for the payment of the sum of 10*l.*, with intent to defraud the Postmaster-General.

*Pickering*, Q.C. (Attorney-General for the County Palatine), and *West*, Q.C., for the prosecution.

*Cottingham* for the defence.

*Pickering*, Q.C., proposed to call a witness whose name did not appear on the depositions taken before the magistrate.

*Cottingham* objected, on the ground that it was most unfair to call a witness who had not given evidence before the magistrates, and whose name and the substance of whose evidence had not been given to the prisoner or his attorney, and also that it was contrary to the usual practice in criminal courts; in support of this view he cited *Reg. v. Pietro Stiginani* (10 Cox Crim. Cas. 552), tried before Willes, J., at the Central Criminal Court.

BRETT, J., however, overruled the objection, and admitted the evidence.

*Guilty.*

On the following day BRETT, J., said he had consulted

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

Willes, J., in reference to the case of *Reg. v. Pietro Stiginani*, (a) reported in 10 Cox Crim. Cas. 552, and he had his authority for saying that his judgment was there incorrectly reported, and that he (Willes, J.) was of opinion that, if the evidence was relevant, it ought to be received; but, however, notice of its production ought to be given to the prisoner, or his attorney, and if such notice was not given, it was a subject for strong comment.

REG.  
v.  
GREENSLADE.  
—  
1870.  
—  
Practice—  
Witness—  
Depositions.

(a) In reference to the report of the case, *Reg. v. Pietro Stiginani* (10 Cox Crim. Cas. 552), the reporter has been favoured with the following remarks relating to it from Mr. Justice Willes:—"The report of *Reg. v. Pietro Stiginani*, erroneously states that I ruled the evidence not to be admissible in point of law (with the statutory exception of treason), evidence of which notice has not been given is admissible; but the practice when I came to the bench was, and it is, I think, a proper practice, that the names and a concise statement of the proofs of the witness who had turned up since the committal, and more especially if they speak to new facts, ought to be supplied to the judge in time to charge the grand jury, and at all events to the prisoner or his counsel. The result of the present occasional lax practice is, on the one hand, that a judge may tell the grand jury to throw out a bill for want of evidence supplied by the additional proof, and on the other that a prisoner or his counsel may have evidence sprung upon him by surprise. This rarely happens, but it ought to be made practically impossible by following the correct practice. I never let evidence, of which notice has not been given, pass without strong observation.—WILLES, J."

## COURT OF QUEEN'S BENCH.

December 13—22, 1869.

(Before COCKBURN, C.J.)

REG. v. GURNEY AND OTHERS. (a)

*Criminal procedure—Practice—Right of prosecutor to appear in person—Conspiracy to cheat and defraud the public by circulation of a false prospectus.*

*In a criminal prosecution it is not competent to the prosecutor to appear and conduct the case in person.*

*But on an affidavit that it was expected that counsel would be instructed the trial was postponed.*

*On an indictment for conspiracy to cheat and defraud the public by means of the circulation of a false prospectus, to induce them to take shares in a worthless company, the doctrine laid down by Lord Ellenborough as to conspiracy in Reg. v. Beranger (3 M. & S.) upheld and applied.*

*On such an indictment, assuming the intent to cheat and defraud, defendants, who were parties to the design, are liable for any of the overt acts done by the others in pursuance of such common design. And the overt act laid being the making and circulating a false prospectus, a defendant, if party to such a design, might be liable, although he took no part in drawing the prospectus, and though he was absent at the time it was circulated; and, therefore, held, that such a defendant was not, on those grounds, entitled to acquittal, as distinguished from the others.*

*In such a case, the company being formed for the purpose of taking the transfer of a business, the prospectus stating that, in the opinion of the directors (who included the members of the old firm), the business was such as would secure a highly remunerative return to the shareholders; that the vendors guaranteed deficiencies in the assets and liabilities transferred; and there being no proof to falsify any of the statements in the prospectus, beyond evidence that at the time of the transfer there was an enormous deficiency in the trade assets of the firm, which, however, would,*

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

*upon estimates (shown to have been honest and reasonable), have been in time made up by other assets and by the partners' private estates, and the business itself being extremely lucrative, and indeed of enormous magnitude :*

*Held, that the substantial question would be, whether the defendants had an honest, although erroneous, belief in this view or intended to cheat and defraud ; and that, in the former view, they could not be convicted, as the essence of the charge was the intent to cheat and defraud.*

REG.  
v.  
GURNEY.  
—  
1869.

Fraud—  
Conspiracy—  
Practice.

**I**NDICTMENT for conspiracy to cheat and defraud the public by the formation of a joint-stock company.

The *first count* stated that certain persons, to wit, Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, carried on the business of bill brokers and money dealers, under the style or firm of Overend, Gurney, and Company, and were unable to pay creditors and to meet their debts, liabilities, and engagements. And that at the time of the commission of the offence hereinafter in this count mentioned, the said Henry Edmund Gurney, Henry Ford Barclay, John Henry Gurney, the said Robert Birkbeck, Harry George Gordon, and William Rennie, were directors of a public company, to wit, of a company called Overend, Gurney, and Company, Limited. And that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Henry George Gordon, and William Rennie, being such directors of the said public company ; and whilst they were such directors, and well knowing the premises in this count mentioned, on the twelfth day unlawfully, and with intent to induce and persuade divers of the liege subjects of our said Lady the Queen to the jurors aforesaid unknown, not then ascertained, to wit, all such said liege subjects as should be induced so to do, by a belief in the truth of a statement and account next hereinafter mentioned, to become and be shareholders in the said public company, did make, circulate, and publish a certain false written statement, purporting to be a prospectus of the said company, called Overend, Gurney, and Company, Limited, of and relating to the affairs of the said company, and which said written statement then and there was and is in the words and figures following, that is to say :

“ Capital 5,000,000*l.*, in 100,000 shares of 50*l.* each, of which it is not intended to call up more than 15*l.* per share. Deposit, on application, 2*l.* per share ; 5*l.* per share on allotment, 4*l.* per share on the 15th of September, and the same on the 15th of November.” [Here were inserted the names of the defendants as directors.]

“ The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. Overend, Gurney, and Company of their long-established business as bill brokers and money dealers, and of the premises in which the business is conducted, the consideration for the

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*In such a case, the company being formed for the purpose of taking the transfer of a business, the prospectus stating that, in the opinion of the directors (who included the members of the old firm), the business was such as would secure a highly remunerative return to the shareholders; that the vendors guaranteed deficiencies in the assets and liabilities transferred; and there being no proof to falsify any of the statements in the prospectus, beyond evidence that at the time of the transfer there was an enormous deficiency in the trade assets of the firm, which, however, would,*

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*upon estimates (shown to have been honest and reasonable), have been in time made up by other assets and by the partners' private estates, and the business itself being extremely lucrative, and indeed of enormous magnitude :*

*Held, that the substantial question would be, whether the defendants had an honest, although erroneous, belief in this view or intended to cheat and defraud ; and that, in the former view, they could not be convicted, as the essence of the charge was the intent to cheat and defraud.*

REG.  
v.  
GURNEY.  
—  
1869.

Fraud—  
Conspiracy—  
Practice.

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v.  
GURNEY.  
—  
1869.  
—  
*Fraud—  
Conspiracy—  
Practice.*

goodwill being 500,000*l.*, one half being paid in cash and the remainder in shares of the company, with 15*l.* per share credited thereon, terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders. The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

“ Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr. Henry Edmund Gurney and Mr. Robert Birkbeck) will also occupy the position of managing directors, and undertake the general conduct of the business. The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment. The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders. Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company.” And which said written statement then and there was false in certain material particulars, as they, the said Henry Edmund Gurney, &c., when they so made, circulated, and published the same as aforesaid, well knew : that is to say, in the material particulars following. It was therein falsely stated that it was not intended to call up more than 15*l.* per share upon the shares of the said company. That the consideration for the goodwill of the said firm of Overend, Gurney, and Company, being 500,000*l.*, one half being paid in cash and the remainder in shares of the said Overend, Gurney, and Company, Limited, with 15*l.* per share credited thereon, were terms which, in the opinion of the said directors, could not fail to insure a highly remunerative return to the said shareholders in the said Overend, Gurney, and Company, Limited. That the business of the said firm of Overend, Gurney, and Company would be handed over to the new company (meaning the said Overend, Gurney, and Company, Limited) on the 1st day of August then next, the vendors, that is to say, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, guaranteeing the said company of Overend, Gurney, and Company, Limited, against any loss on the assets and liabilities transferred. That the said Henry Edmund Gurney and Robert Birkbeck would also retain a large pecuniary interest in the said company of Overend, Gurney, and Company, Limited. That copies of the said last-mentioned company's memorandum and articles of association, as well as of the deed of covenant, in relation to the transfer of the business, could be inspected at the offices of the solicitors of the said

company, whereas, in truth and in fact, it was not true that it was not intended to call up more than 15*l.* per share upon the shares of the said company, called Overend, Gurney, and Company, Limited; for, in truth and in fact, the said call of 15*l.* per share upon the shares of the said company was not then sufficient to pay the then existing liabilities of the said company, called Overend, Gurney, and Company, which then amounted to the sum of 3,000,000*l.* over and above their assets. And whereas, in truth and in fact, the consideration for the goodwill of the said firm of Overend, Gurney, and Company, being 500,000*l.*, one-half being paid in cash and the remainder in shares of the said company with 15*l.* per share credited thereon, were not terms which could insure a highly remunerative return to the shareholders; for, in truth and in fact, the payment by the said shareholders of 250,000*l.* to the members of the said firm of Overend, Gurney, and Company, and the issue of the said shares with 15*l.* per share credited thereon, would have been a payment to them without any valuable consideration, and would have been unremunerative to the said shareholders by reason of the want of such consideration. And whereas, in truth and in fact, the said vendors, to wit, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, could not guarantee the said company of Overend, Gurney, and Company, Limited, against any loss on the assets and liabilities transferred by the said vendors; for, in truth and in fact, there had been and then was an existing loss on the said assets and liabilities of the said vendors to an amount exceeding 3,000,000*l.* And whereas, in truth and in fact, the said Henry Edmund Gurney and Robert Birkbeck had not then any pecuniary interest to retain, and could not and did not retain any such interest in the said company of Overend, Gurney, and Company, Limited; but, on the contrary thereof, had incurred, as partners in the said firm of Overend, Gurney, and Company, large liabilities, and were then indebted in large sums of money to the said company of Overend, Gurney, and Company, Limited, to wit, to the amount of 3,000,000*l.* And whereas, in truth and in fact, the deed of covenant mentioned and referred to in the said prospectus, and tendered for the inspection of intended shareholders in the said company of Overend, Gurney, and Company, Limited, was not the only deed of covenant which had been prepared; and, in fact, another deed of covenant and arrangement, bearing even date therewith, was then prepared, containing other covenants and stipulations than those contained in the said deed of covenant referred to in the said prospectus, and containing covenants and stipulations adverse to the interests of the said intended shareholders in the said Overend, Gurney, and Company, Limited, as they, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, then and there well knew; against the form of the statute in such case made and pro-

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Conspiracy—  
Practice.*

## COURT OF QUEEN'S BENCH.

December 13—22, 1869.

(Before COCKBURN, C.J.)

REG. v. GURNEY AND OTHERS.(a)

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*upon estimates (shown to have been honest and reasonable), have been in time made up by other assets and by the partners' private estates, and the business itself being extremely lucrative, and indeed of enormous magnitude :*

*Held, that the substantial question would be, whether the defendants had an honest, although erroneous, belief in this view or intended to cheat and defraud ; and that, in the former view, they could not be convicted, as the essence of the charge was the intent to cheat and defraud.*

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Fraud—  
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goodwill being 500,000*l.*, one half being paid in cash and the remainder in shares of the company, with 15*l.* per share credited thereon, terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders. The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

“ Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr. Henry Edmund Gurney and Mr. Robert Birkbeck) will also occupy the position of managing directors, and undertake the general conduct of the business. The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment. The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders. Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company.” And which said written statement then and there was false in certain material particulars, as they, the said Henry Edmund Gurney, &c., when they so made, circulated, and published the same as aforesaid, well knew: that is to say, in the material particulars following. It was therein falsely stated that it was not intended to call up more than 15*l.* per share upon the shares of the said company. That the consideration for the goodwill of the said firm of Overend, Gurney, and Company, being 500,000*l.*, one half being paid in cash and the remainder in shares of the said Overend, Gurney, and Company, Limited, with 15*l.* per share credited thereon, were terms which, in the opinion of the said directors, could not fail to insure a highly remunerative return to the said shareholders in the said Overend, Gurney, and Company, Limited. That the business of the said firm of Overend, Gurney, and Company would be handed over to the new company (meaning the said Overend, Gurney, and Company, Limited) on the 1st day of August then next, the vendors, that is to say, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, guaranteeing the said company of Overend, Gurney, and Company, Limited, against any loss on the assets and liabilities transferred. That the said Henry Edmund Gurney and Robert Birkbeck would also retain a large pecuniary interest in the said company of Overend, Gurney, and Company, Limited. That copies of the said last-mentioned company's memorandum and articles of association, as well as of the deed of covenant, in relation to the transfer of the business, could be inspected at the offices of the solicitors of the said



company, whereas, in truth and in fact, it was not true that it was not intended to call up more than 15*l.* per share upon the shares of the said company, called Overend, Gurney, and Company, Limited; for, in truth and in fact, the said call of 15*l.* per share upon the shares of the said company was not then sufficient to pay the then existing liabilities of the said company, called Overend, Gurney, and Company, which then amounted to the sum of 3,000,000*l.* over and above their assets. And whereas, in truth and in fact, the consideration for the goodwill of the said firm of Overend, Gurney, and Company, being 500,000*l.*, one-half being paid in cash and the remainder in shares of the said company with 15*l.* per share credited thereon, were not terms which could insure a highly remunerative return to the shareholders; for, in truth and in fact, the payment by the said shareholders of 250,000*l.* to the members of the said firm of Overend, Gurney, and Company, and the issue of the said shares with 15*l.* per share credited thereon, would have been a payment to them without any valuable consideration, and would have been unremunerative to the said shareholders by reason of the want of such consideration. And whereas, in truth and in fact, the said vendors, to wit, the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, could not guarantee the said company of Overend, Gurney, and Company, Limited, against any loss on the assets and liabilities transferred by the said vendors; for, in truth and in fact, there had been and then was an existing loss on the said assets and liabilities of the said vendors to an amount exceeding 3,000,000*l.* And whereas, in truth and in fact, the said Henry Edmund Gurney and Robert Birkbeck had not then any pecuniary interest to retain, and could not and did not retain any such interest in the said company of Overend, Gurney, and Company, Limited; but, on the contrary thereof, had incurred, as partners in the said firm of Overend, Gurney, and Company, large liabilities, and were then indebted in large sums of money to the said company of Overend, Gurney, and Company, Limited, to wit, to the amount of 3,000,000*l.* And whereas, in truth and in fact, the deed of covenant mentioned and referred to in the said prospectus, and tendered for the inspection of intended shareholders in the said company of Overend, Gurney, and Company, Limited, was not the only deed of covenant which had been prepared; and, in fact, another deed of covenant and arrangement, bearing even date therewith, was then prepared, containing other covenants and stipulations than those contained in the said deed of covenant referred to in the said prospectus, and containing covenants and stipulations adverse to the interests of the said intended shareholders in the said Overend, Gurney, and Company, Limited, as they, the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, then and there well knew; against the form of the statute in such case made and pro-

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vided,(a) and against the peace of our said Lady the Queen, her crown, and dignity.

The five following counts, from the second to the sixth, were also founded on the statute.

The *second count* stated that the said Samuel Gurney had contracted and agreed with the said Henry Edmund Gurney for the sale of the said business and for the formation of a company, they, the said Samuel Gurney, &c., then, at the time they so contracted and agreed as aforesaid, being unable to pay their creditors and to meet their debts, liabilities, and engagements; and unlawfully and with intent, to induce divers persons, to wit, persons being customers of the said firm of Overend, Gurney, and Company, ignorant of the real pecuniary condition of the said firm, and ignorant of the real pecuniary condition of the said public company, called Overend, Gurney, and Company, Limited, and all such other persons as could be induced so to do, by the false statement next hereinafter mentioned, to intrust the moneys and property of the said several persons to the said public company, unlawfully did make, circulate, and publish a certain false written statement, purporting to be a prospectus of the said public company, and to be a statement of and relating to the affairs of the said company, to wit, the written statement mentioned and set forth in the first count of this indictment, and which said written statement then and there was false in certain material particulars, as they well knew [setting them out as before].

The third count, the fourth, the fifth, and the sixth were similar, except in varying, according to the terms of the statute, the particular intent stated—that is, in the third it was stated to have been to induce customers and others to advance their moneys; and in the fourth it was stated to have been to induce persons to become shareholders, &c.

The seventh and the following counts (to the eighteenth) were for a conspiracy to publish a false prospectus.

The *seventh count* stated that certain persons, to wit, Samuel Gurney, &c., carried on the business of bill brokers and money dealers at No. 65, Lombard-street, in the City of London, under the style or firm of Overend, Gurney, and Company, and at the time of the commission of the offence hereinafter mentioned were unable to pay their creditors and to meet their debts, liabilities, and engagements. And that at the time of the offence hereinafter in this count mentioned, Henry Edmund Gurney, &c., had contracted and agreed with the said Samuel Gurney, Henry Edmund Gurney, David Ward Chapman, and Robert Birkbeck, for the pur-

(a) The 24 & 25 Vict. c. 96, s. 84: "Whoever being a director, manager, or public officer, of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body or company, or with intent to induce any person to become a shareholder or partner therein; or to extend or advance any property to such body, or to enter into any security for its benefit, shall be guilty of a misdemeanor."

chase of the said business of Overend, Gurney, and Company, and for the transfer of all the assets and liabilities of the last-mentioned firm to a public company, to be called Overend, Gurney, and Company, Limited, of which last-mentioned company they, the said Henry Edmund Gurney, &c., were to be directors. And that the said Henry Edmund Gurney, &c., and divers other persons, whose names to the jurors aforesaid are unknown, well knowing the premises on the 1st day of July, 1865, within the jurisdiction of the Central Criminal Court, unlawfully and wickedly, and with intent to deceive and defraud, did conspire, combine, confederate, and agree together to make, circulate, and publish a certain false written statement of and relating to the affairs of a certain public company, to wit, the said company called Overend, Gurney, and Company, Limited, with intent to induce and persuade divers of the liege subjects of our said Lady the Queen, to the jurors aforesaid unknown, and not then ascertained by them, the said Henry Edmund Gurney, &c., to wit, all such of the liege subjects as should be induced so to do, by a belief in the truth of the said statement and account, to become and be shareholders in the said public company. And they do further present that the said Henry Edmund Gurney, in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, did make, circulate, and publish a certain false written statement, and which said written statement then and there was false in certain material particulars, as they, the said Henry Edmund Gurney, &c., then and there well knew, that is to say, in the material particulars following [setting them out as before, with the same allegations of falsehood as before].

The eighth and ninth counts were similar, varying the allegations of intent, as in the former set of counts, according to the terms of the statute.

The tenth and following counts to the eighteenth were similar, except in varying the statement of intent, stating it to have been to create in the public mind a belief that the company was carrying on a prosperous business, and that their affairs were in a prosperous condition; averment, that thereby they induced one Adam Thom (the prosecutor) to take shares, with intent to defraud and deceive him.

The following counts varied the name of the particular person thus induced to take shares, with intent to deceive and defraud him. The last count of this set of counts was general.

The *seventeenth count* stated that the said Henry Edmund Gurney, &c., afterwards, to wit, on the 12th day of July, and in the year aforesaid, &c., unlawfully and wickedly did conspire, combine, confederate, and agree together, unlawfully and knowingly, to make, circulate, and publish a certain written statement, false in certain material particulars, to wit, a false written statement, purporting to be a prospectus of a public company, to wit, the said company of Overend, Gurney, and Company, Limited, of and relating to the affairs of the said company, which said false

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written statement they, the said Henry Edmund Gurney, &c., at the time when they so conspired as aforesaid well knew to be false in certain material particulars, with intent to deceive and defraud the shareholders of the said public company, and to induce any persons upon whom they, the said Henry Edmund Gurney, &c., could prevail by the false statement aforesaid so to do to become shareholders in the said public company, and to intrust the property of the said persons to the said public company, against the peace of our said Lady the Queen, her crown, and dignity.

The eighteenth and the following counts, to the thirty-first, were on a conspiracy to cheat and defraud by means of false pretences and devices, which were stated generally; the variations in these counts were as to the statement of the intent to defraud, some stating it to have been to defraud particular individuals and some stating it generally.

The *eighteenth count* stated that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, afterwards, to wit, on the said 12th day of July, in the year aforesaid, within the jurisdiction of the said court, together with divers other evil-disposed persons, unlawfully did conspire, combine, confederate, and agree, by divers false pretences, and by divers artful and subtle means, stratagems, and devices, to obtain and acquire to themselves of and from one Adam Thom divers of the moneys of the said Adam Thom to a large amount, to wit, to the amount of 900*l.*, and to cheat and defraud him of the same, against the peace of our said Lady the Queen, her crown, and dignity.

The *nineteenth count* stated that the defendants conspired, by divers artful, &c., means and devices to obtain from Adam Thom, &c. The twentieth and twenty-first counts were the same as the two last, except as to the name of the person defrauded.

The twenty-second and twenty-third counts were similar, except in the name; so of the twenty-fourth and twenty-fifth.

The twenty-sixth and following counts to the thirty-first inclusive were similar.

The *thirty-second and last count(a)* was a general count for conspiracy, to make it appear that the business was in a sound and prosperous state, by publishing and circulating a false and fraudulent prospectus. The count stated that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, at the time of the commission of the offence hereinafter mentioned, were directors of a certain public company, to wit, a company called and known as Overend, Gurney, and Company, Limited, and had before then contracted and agreed to purchase of and from one Samuel Gurney and others a certain business carried on by the said Samuel Gurney and others as bill brokers and money dealers,

(a) It was chiefly commented upon by the Lord Chief Justice as containing the substance of the real charge.

and which said business, at the time of the said contract and agreement, was of no value, and the said Samuel Gurney and others then were unable to pay their debts, liabilities, and engagements in respect to such business. And that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, contriving and intending to make it appear to all such persons as should be willing to purchase shares in the said public company that the pecuniary affairs of the said company were in a prosperous condition, and that the said business so carried on by the said Samuel Gurney and others was a solvent and prosperous business; and intended to deceive, prejudice, and defraud such persons as should become shareholders in the said public company on the said 12th day of July, in the year aforesaid, unlawfully and wickedly did conspire together to publish and circulate a certain false statement, &c., concerning the said business, &c. [setting as the prospectus]. And unlawfully, knowingly, and with intent to deceive, injure, impoverish, and aggrieve such persons as should be willing to become purchasers of the shares in the said public company, falsely to pretend to the said persons that it was not necessary to call up more than 15*l.* upon each of the said shares. That the pecuniary affairs of the said business so carried on by the said Samuel Gurney and others were then in a prosperous condition. That the said business of the said Samuel Gurney and others was then of the value of 500,000*l.*, and that three of the members of the said firm of Samuel Gurney and others had consented to join the board of the said public company, in which they would also retain a large pecuniary interest. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Harry George Gordon, and William Rennie, in pursuance of the said unlawful conspiracy, combination, confederacy, and agreement, did, by the said false statement and false pretences, cause and induce one Adam Thom to purchase divers, to wit, sixty shares in the said public company; and one Thomas Clark to purchase divers, to wit, forty shares in the said public company; and one Charles Beard to purchase divers, to wit, one hundred and twenty shares in the said public company; and one William Peek to purchase divers, to wit, two thousand shares in the said public company; and one Richard Bridgman Barrow to purchase divers, to wit, two hundred shares in the said public company; and one John Holme to purchase divers, to wit, one hundred and twenty shares in the said public company; and one Edward M. O'Reilly to purchase divers, to wit, sixty shares in the said public company; with intent to injure, impoverish, deceive, and aggrieve the said Adam Thom, Thomas Clark, Charles Beard, William Beard, William Peek, Richard Bridgman Barrow, John Holme, and Edward M. O'Reilly respectively. Whereas, in truth and in fact, it was then necessary to call up more than 15*l.* upon each

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of the said shares ; for, in truth and in fact, the said public company was then indebted to divers persons to a large amount, to wit, to the amount of 3,000,000*l.* over and above their assets. And whereas, in truth and in fact, the pecuniary affairs of the said business so carried on by the said Samuel Gurney and others were not then in a prosperous condition, but, on the contrary thereof, were in an insolvent state. And whereas, in truth and in fact, the said business of the said Samuel Gurney and others was not then of the value of 500,000*l.*, nor was the same of any value, but, on the contrary whereof, was involved in debt to an amount greatly exceeding the assets thereof. And whereas, in truth and in fact, the said three members of the said firm of Samuel Gurney and others had not a large pecuniary interest to retain in the said public company, and, on the contrary thereof, were then largely indebted to the same.

Plea, not guilty.

#### CASE.

The case came on for trial in its order, at the sittings after Trinity Term, 1869 ; but no counsel had been instructed for the prosecution ; and, it having been intimated by the Lord Chief Justice at chambers that he should not allow the prosecutor to conduct the case in person, as he proposed to do, (a)

(a) That this would be inadmissible appears clear from the authorities. At common law the proceeding by appeal was open to private prosecutors, and until the stat. 3 Hen. 7, this proceeding had priority within a year and a day ; and this statute only does away with that priority in case of murder. The proceeding by appeal, however, was under private control ; but it was otherwise of the proceeding by indictment, which was the suit of the Crown. The proceeding by information *tam pro Domine Rege quam pro se ipso* was of a mixed nature ; and as the party had an interest, he was allowed to appear and conduct it in person (*Giles' case*, St. Tri. 1180). But it was not so in a prosecution by the Crown on indictment. The proceeding by appeal was abolished in 1819 (59 Geo. 3, c. 46) ; and nevertheless, about the same time, it was held that the prosecutor on an indictment had no right to appear and conduct the case in person : (*R. v. Brice*, 2 B. & Ald. 606 ; Chit. Rep. 352 ; *R. v. Milne*, 2 B. & Ald. 606 ; *Rex on Prosecution of Hunt v. Justices of Lancashire* ; Chit. Rep. 602 ; *R. v. Stoddart*, Dickenson's Quarter Sessions, 122, 476.) In the case last cited this was distinctly laid down by Lord Tenterden. That case was an indictment for libel ; and the prosecutor, Mr. Hunt, appeared in person, when the Lord Chief Justice made the following observations as to the course to be pursued : " If it be your intention to address the jury, it is a course which you will not be permitted to pursue. It has been determined by all the judges of the Court of King's Bench, and that determination had been publicly expressed on more than one occasion, together with the concurrence of many of the other judges, that a prosecution by indictment is not, in point of law, the suit of an individual. If any individual seeks redress—personal redress for personal injury—the course that he is to pursue is to bring an action for damages. If, instead of electing to bring his action for the redress of a personal injury, he thinks fit to put the law in motion in the name of the King, for the sake of public justice, it is not his suit, but it is the suit of his Majesty. Where a person, therefore, chooses to proceed by indictment, he has no right to address the jury, unless he is a gentleman at the bar. That opinion has been solemnly pronounced by all the judges of the Court of King's Bench. We have at every assizes, and under every commission of gaol delivery in London, at every court of quarter session holden throughout the country, a great number of prosecutions, instituted certainly by private individuals, in which the name of his Majesty is used ; but in none of them it is even thought that the person prosecuting has a right to address the jury. The course taken on every occasion of a criminal prosecution is, where there are depositions, that the judge refers to them, and examines the witnesses one by one, according to those depositions. Where there are no depositions, as in cases of this



The *Attorney-General* (Sir R. Collier) appeared on the part of the prosecutor (as instructed, he said, not in the case, but only for the purpose of the present application), and applied for a postponement of the trial, on the ground that counsel, on account of certain reasons, had not yet been instructed in the case, and that its magnitude was such that it was impossible that counsel could have been adequately instructed in it since the announcement of the intention of the Lord Chief Justice not to hear the prosecutor in person. He moved, upon an affidavit by the attorney for the prosecutor, that it was believed counsel would be instructed to conduct the case at the trial if it was postponed for that purpose.

The *Solicitor-General* (Sir J. D. Coleridge) (a) and Sir J. *Karslake*, who were instructed for the defence, did not oppose the application, and

COCKBURN, C.J., assented to it.

The cause was accordingly put off till the next sittings, when the case then came on for trial.

*Kenealy* and *Macrae Moir* conducted the case for the prosecution.

Sir J. *Coleridge* (Solicitor-General), *Hawkins*, Q.C., *Ballantine*, Serjt., and J. O. *Mathew*, appeared for the defendants, the Messrs. Gurney and Birkbeck, members of the original firm.

Sir J. *Karslake* and *Ledgard* appeared for Mr. Gordon.

*Mellish*, Q.C., *Parry*, Serjt., and M. *Williams*, appeared for the defendant, Mr. Barclay.

*Giffard*, Q.C., *Poland*, and B. *Gardyne* were for the defendant, Mr. Rennie.

*Kenealy*, in opening the case for the prosecution, stated it as being in substance, first, a charge of conspiracy to induce persons to become shareholders in a certain company by publishing and circulating a false prospectus. He cited the law on conspiracy, as laid down by Lord Ellenborough in the case of *Rex v. De Berenger*, (b) who was charged, with Lord Cochrane and others, with endeavouring to raise the price of stock by false rumours: "The offence of conspiracy is an offence consisting in the wicked concert, contrivance, and combination of individuals

description, it has been usual for the judge to consult the person prosecuting as to the manner of bringing his case before the court, and as to the witnesses proper to be examined. That is the way in which justice is administered in such cases, and that is the course of proceeding I mean to adopt on the present occasion. Mr. Hunt will communicate with me, and give me the name of his witnesses. If he is disposed to proceed in that way, it shall be done. That is the only course I shall allow, and if you do not choose to have justice administered in your case according to the ordinary and established rules and opinions of the judges of the land, and record must be withdrawn." (Dickenson's Quarter Sessions, 122.) This had been the law and the practice, whether or not the prosecutor was to be a witness; but if he was, then another objection arose, that a person could not be witness and advocate on the same side, civil or criminal.

(a) A discussion had taken place in the House of Commons as to the propriety of one of the law-officers of the Crown appearing as counsel for the defendant in a criminal prosecution, and also as to the inconvenience arising from the absence of public prosecutors. (Vide *Hansard's Debates*, 1869.)

(b) § M. & S. See *vide Rex v. Steward* (Ad. & E. 710) as to unlawful means being necessary in conspiracy.

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to effect some public or private injury or mischief; that contrivance and that combination is not to be collected, nor is it practicable in the course of human affairs to collect it, from the mouths of the parties assembled, for the purpose of communication, but from the actings and conduct of the several parties as they may appear generally to conspire and conduce to the same wicked end and purpose; and if it appears to you, from the actings and conduct of these parties, that they entertained the same common purpose of mischief, and that they have, by their several actings, combined and co-operated to the effecting that same wicked purpose, that is sufficient to bring home the imputation of the crime charged against the parties; therefore the prosecutors need not show that they have met in common counsel, or even that they have seen one another before, if their acting shows they were influenced by one common purpose of mischief, and aimed at the production of the same malignant end and effect. Suppose persons jointly charged in an indictment with the breaking of a house are found on different sides of the same house, besetting and endeavouring to enter it at the same time, you need not show that they had actually met and previously contrived the plan of this joint robbery. The unity of their conduct proves the joint contrivance and concert to accomplish the same end, though, indeed, this is a case where personal presence at the acts done renders all intendment of the personal concert of the actors unnecessary. The same rules which apply to the offence of conspiracy as a misdemeanor would apply equally to all crimes committed by concert up to the crime of high treason, which is often established by evidence of the distinct actings of separate parties, breathing the same purpose and immediately conducing to the same end. The question, therefore, for you to consider upon the evidence will be whether the case is not brought home by satisfactory evidence to a great number, if not to all, the defendants." It was not necessary, therefore, to prove that the defendants were ever actually together. Nor was it necessary to show that defendants had aimed at any pecuniary result by the conspiracy; for Lord Ellenborough in that case said: "The crime charged upon this indictment, in eight different charges or counts, is that of conspiring to raise the price of the public funds; in some of them it is charged to be with a view to corrupt gain upon the part of these persons, or some of them, or at least to the prejudice of other individuals, for that is enough to constitute the offence, even if the individuals engaged in the conspiracy had not (as it is imputed to them that they had) any corrupt motive of personal advantage to all or any of themselves to answer; if the criminal artifice operated, or was, in all probability, likely to operate to the prejudice of the public, and was clearly so intended, we need not go further." Such being the general law as to conspiracy, the defendants, he said, were charged in substance with a conspiracy to defraud the public of three millions of money by means of a

worthless company, in which they were to be induced to take shares by the circulation of a false and delusive prospectus. He did not, however, rest the case on any particular and specific false statement in the prospectus, but on a general representation of the solvency and value of what was really worthless. The company was formed to take and carry on the business of Overend and Gurneys, the great money lenders and bill brokers. And the case for the prosecution, as he opened it, appeared to resolve itself into this: that the transfer had been entered into when the vendors, the members of the old firm, were known to be in a state of insolvency, so that it was in contemplation of bankruptcy. He opened no specific misstatements on the prospectus, but dwelt almost entirely on the alleged insolvency of the firm, and on a combination to dispose of the business, knowing of the insolvency. He admitted that the business had been one of enormous profit (as much, he said, as 120,000*l.* a year), but he stated that the firm had, by exceptional advances, out of the scope of their regular and proper business, made bad or doubtful debts, during the few previous years, to the amount of above 4,000,000*l.*; and that these, though only estimated as good to the amount of 1,000,000*l.*, were represented as good assets. It was, however, pointed out at once by the Lord Chief Justice that he opened no evidence to show that any such representation was ever made to the public or shareholders; nothing being stated on the subject in the prospectus (which, on the contrary, spoke of a guarantee by the vendors of any deficiency in the assets); and, on the whole, the case for the prosecution appeared to resolve itself into this, that the transaction was entered into by the old firm in a state of hopeless insolvency and in contemplation of bankruptcy.<sup>(a)</sup> He put the case, however, thus: that by the deed of transfer all the assets were transferred; and that this deed was referred to in the prospectus, and would induce persons who read it to presume that all the assets were good, or, at all events, that they would not suppose that such a large amount was bad. He put it, therefore, as a deficiency of 3,000,000*l.* in the trade assets, concealed or not disclosed; and, as he suggested, fraudulently concealed. There was a second deed, not disclosed, in which there was a guarantee of the 4,000,000*l.* as the amount of excepted accounts; and he supposed the case for the defence would be that these were not transferred; but the fact was that by the first deed all the assets were transferred and that the defendants then transferred certain assets back to themselves by the second and secret deed.

COCKBURN, C.J., observed that the 4,000,000*l.*, which may have turned out worthless, were not held out to the public as available assets belonging to the company, but were included in a distinct deed and distinct account as remaining still in the old firm.

*Kenealy* contended it was a fraud, being transferred to the

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(a) As to which vide *Belcher v. Prettie* (10 Bing.)

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new company as part of the 15,000,000*l.* assets. He maintained that the transaction was carried out in contemplation of the insolvent state of the defendants. He did not enter into further particulars of the alleged fraud; he specified no particular statements in the prospectus put forth, which he imputed to be false, except a general statement that, in the opinion of the directors, the concern would prove profitable.

As no evidence was called for the defence, the case rested entirely on the evidence of the witnesses for the prosecution, of whom the principal and most important were the official liquidators, who, ever since the company failed (in May, 1866), had the books and affairs of the firm and the company under their control. The substance of the case, as it thus appeared in the evidence for the prosecution, was as follows:

In July, 1865, the then partners in the house of Overend, Gurney, and Company (the defendants, Messrs. Gurney and Birkbeck), entered into negotiations with the other defendants, Messrs. Gordon, Rennie, Barclay, and a deceased director, Mr. Gibbs, as to the formation of a company for the purpose of taking the business of that house as money dealers and bill brokers. It was an old-established house, and the amount of its regular business was enormous. From 1859 to 1866 the amount of money turned over was about 150,000,000*l.* a year; the annual amount of bills discounted varied from 60,000,000*l.* to 70,000,000*l.*; and the average annual amount of profit was from 180,000*l.* to 190,000*l.* a year. For ten years, from 1850 to 1860, the average annual amount of profit had been 220,000*l.* a year, and the average amount divided had been 146,000*l.* a year. Since 1860, however, when heavy losses, on account of exceptional advances, had been made, no profits had been divided; but the profits had been carried to a reserve fund, although the profits made in the regular business had been as great as before. In 1861 the profit was 261,670*l.*; in 1862, 167,200*l.* The total amount earned from 1861 to 1864 was 600,000*l.*; and, deducting 480,000*l.*, written off for bad debts, the profit left was 120,000*l.* And for the first five months of 1865 to the end of July the profit made had been 32,900*l.* The business, therefore, was large.

On the other hand, the bad and doubtful debts, arising from the exceptional advances alluded to, amounted to 4,000,000*l.*, of which only 1,000,000*l.* were estimated as good, leaving an apparent deficiency on the trade assets of 3,000,000*l.*, or a balance-sheet of 15,000,000*l.* But, then, of the debts there was a sum of 1,000,000*l.* due to the partners themselves on their private accounts; and, deducting this from the apparent deficiency, the amount of deficiency would be reduced to 2,000,000*l.*(a) To meet this, the partners made estimates of the value of their private estates, which (in round numbers) came so

(a) And accordingly that was the amount stated in the bill in equity, filed on the part of the shareholders against the directors, a deficiency, be it observed, on the trade assets.

near to 2,000,000*l.*, as in effect nearly, if not quite, to balance it. To realise these estates, however, at their full and fair value, and also to realise 1,000,000*l.* of trade assets estimated to be good, out of 4,000,000*l.* doubtful, time would be required, and for that time a material guarantee. And the plan proposed by the members of the firm to the four other defendants was, in effect, to allow them three years and a half to realise these estates and assets, so as to meet the deficiency in the assets, and in the mean time to take their guarantee for the whole amount of the deficiency.

The four defendants to whom this proposal was made were, it was admitted, men of high position—merchants and bankers in the city. One of them, Mr. Gordon, had been for sixteen years chairman of the Oriental Bank; another, Mr. Rennie, was connected with an old-established private bank; another, Mr. Barclay, was a man of large wealth—part proprietor of the great Norwich Bank; and the deceased director, Mr. Gibbs, was, it was admitted, a man of the highest character and of most ample means.

It was also admitted that to these gentlemen, the co-defendants, the members of the old firm, made ample disclosures of everything in the affairs of their house. There was no evidence that they had not, as there was some evidence that they had; and the whole scheme of the prosecution in joining the whole of the directors together in an indictment for conspiracy of course implied that the new directors knew as much as the old; nor was it ever imputed by any of them that they had not. With respect to the position of the firm at the time of the transfer, the effect of the evidence was that, though the firm was insolvent, the members of the firm were solvent. There was a deficiency in the trade assets, but a surplus, according to the estimates, on the whole of the assets. The regular business was as large and lucrative as ever. The official liquidator, being asked as to whether, on the whole, the firm were solvent at the time of the transfer, said that, excluding the private estates, they were not; and, supposing the firm had stopped payment on that day, instead of transferring their interest, there would, so far as the joint estate, the partnership property, was concerned, have been a deficiency, but not on the whole of their assets.

COCKBURN, C.J., at the close of the examination of the official liquidator.—Was there anything in the books to lead you to think that, if the business were conducted as a bill-discounting, money-lending business ought to be, without any of its funds being applied to purposes foreign to such business, there was anything to prevent the business from being conducted as prosperously and satisfactorily as it had been before?

Witness: I think not. Such is my opinion from the result of my examination. I have given the matter a great deal of consideration, and I am of opinion that if the firm had not formed themselves into a company, they might have been in existence at the present time.

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The case for the prosecution was directed mainly to the 4,000,000*l.* bad or doubtful assets. The witness most relied upon by the prosecution being asked whether, excluding the doubtful business, the regular and proper business was not large and profitable, could not answer.

COCKBURN, C.J.—That is a point which has appeared to me most important, whether, supposing the 4,000,000*l.* to be struck out of account altogether, the business was not sound.

The witness, however, was unable to say whether, upon the money-dealing and bill-broking business alone, large profits were not made from 1857 to 1865 inclusive.

With regard to the 4,000,000*l.* bad or doubtful assets, it was proved that in some instances the debts had become hopeless, the debtor having been bankrupt or insolvent, and yet had not been written off. This, however, was only on the books, and no representation to the public or the shareholders appeared to have been made as to these debts being good assets.

The witness most relied on for the prosecution—an accountant employed by one of the shareholders—thought that a sum of above 7,000,000*l.* ought to be added to the liabilities of the firm, in respect of bills re-discounted by them and dishonoured, which he considered exceptional. As to these he was asked, on the part of the prosecution, whether he considered them exceptional.

The *Solicitor-General* objected to the question, as not coming legitimately within the witness's evidence as an "expert."

COCKBURN, C.J.—He is very well acquainted with figures, but I cannot accept the evidence of an accountant as to the responsibility of parties whose names are upon bills; he can only tell us positive facts as to his knowledge. An adept or expert speaks to some matters of science or business with which he is immediately and peculiarly conversant.

It was proposed to ask the witness whether he was well acquainted with the commercial status of persons carrying on business in London. This was objected to; and

COCKBURN, C.J., said, I do not think he is more competent to give an opinion on that matter than anybody else. It is not within his peculiar province as an adept. Matters of figures are within his province, but the commercial status of merchants in London is beyond his experience. He can only be asked as to specific facts within his knowledge.

Letters were put in between one of the defendants to another member of the firm, whence it appeared that they had entered into calculations and estimates as to the value of their assets and private estates, which left a surplus. A paper was produced which had been drawn up by one of them at the time, in which that result was arrived at; and the official liquidator declared that, in his view at the time, those estimates were reasonable.

In the letters alluded to, also, the members of the old firm appeared fully alive to the fact that the guarantee to be given might, in the event of a deficiency in the trade assets, absorb their



whole private estates—even their settlements; and although one of them remonstrated, on the ground that, in the event of a real catastrophe (*i.e.*, a large deficiency), the result would be disastrous to himself, yet ultimately they all agreed to give such a guarantee. And there was no evidence that any of them had ever doubted its sufficiency, or supposed that it would not meet the deficiency. The price of the goodwill of the business was to be 500,000*l.*, of which half was to be taken in shares paid up, and the other half, with the shares, was to remain in the hands of the company as a material guarantee.

Such being the base of the agreement entered into between the old firm and the proposed new directors, the solicitor of the old firm was instructed to take the necessary steps to carry it out; and he instructed counsel to prepare the proper documents. Counsel deemed two deeds necessary—the one, a deed of transfer, to transfer the business and the good assets; the other, to provide for the realisation of the doubtful assets, which were not to be transferred, but guaranteed. The new directors employed counsel on their behalf, to whom the drafts were submitted; and as the counsel could not agree as to the terms of the second deed before the 13th of July, when it was desired to bring the prospectus out, and as only the first was then completed, that only was referred to in the prospectus.

On the 12th of July, 1865, the company was registered, and the certificate of incorporation obtained, upon memorandum and articles of association, in these terms:—

“ I. The name of the company is ‘ Overend, Gurney, and Company, Limited.’

“ II. The objects for which the company is established are—the receiving of money on deposit or by discount of bills, and the employment and investment of such money, and of the paid-up capital of the company, in the discounting of bills of exchange and other negotiable securities, and in making advances on loans; and generally, the carrying on of the business of bill brokers and money dealers as heretofore carried on by Messrs. Overend, Gurney, and Company; and, with a view to the above objects, the acquisition of such business upon terms to be agreed by the directors, and the acquisition, by purchase or otherwise, of such other business of a like character, and upon such terms as the directors shall think fit, and the doing of all acts and things incidental or conducive to the attainment of the above objects.”

“ The liability of the members is limited. The capital of the company is 5,000,000*l.*, to be divided into 100,000 shares of 50*l.* each. The subscribers or promoters were Mr. Henry Edmund Gurney, who held 4000 shares; Mr. John Henry Gurney, 4000 shares; Mr. Robert Birkbeck, 2000; Mr. S. Gurney Buxton, 600; Mr. Henry Ford Barclay, 1000; Mr. William Rennie, 400; Mr. Harry George Gordon, 200; and Mr. T. A. Gibbs, 1000 shares.”

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The articles of association were in accordance with the memorandum, authorising the directors to purchase the business on such terms, as to guarantee and otherwise, as they might think fit. Then they provided that the first directors should be Mr. H. E. Gurney, Mr. J. H. Gurney, Mr. R. Birkbeck, Mr. H. F. Barclay, Mr. T. A. Gibbs (since deceased), Mr. H. G. Gordon, and Mr. William Rennie. The two managing directors were to be Mr. H. E. Gurney and Mr. R. Birkbeck, who were to be in office, the first for five and the other for seven years, subject to which the whole of the directors were to retire from office at the first ordinary meeting of the company. By a clause in the articles, 500*l.* a year was paid to the managing directors, and after making allowance out of the net profits for a reserve fund, and the payment of a dividend at the rate of 7 per cent., the managing directors were to be entitled to one-fifth of the surplus profits. By other clauses, an annual sum at the rate of 500*l.* was to be paid to each director other than the managing director, for his services ; such sum, however, to be divided among the directors in such proportions as they should agree upon. Thereupon on the next day, the 13th of July, 1865, the following prospectus was issued :—

“ OVEREND, GURNEY, AND COMPANY, LIMITED.

“ (Incorporated under the Companies Act, 1862.)

“ Capital 5,000,000*l.*, in 100,000 shares of 50*l.* each, of which it is not intended to call up more than 15*l.* per share.

“ Deposit on application 2*l.* per share ; 5*l.* per share on allotment, 4*l.* per share on the 15th of September, and the same on the 15th of November.

“ Directors : Henry Edmund Gurney, Esq., &c. (including the names of all the directors).

“ Offices : 65, Lombard-street.

“ Temporary office for allotment and the registration of shares : 51, Lombard-street.

“ The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. Overend, Gurney, and Company, of their long-established business as bill brokers and money lenders, and of the premises in which the business is conducted ; the consideration for the goodwill being 500,000*l.*, one-half being paid in cash and the remainder in shares of the company, with 15*l.* per share credited thereon, terms which, in the opinion of the directors, cannot fail to insure a highly remunerative return to the shareholders.

“ The business will be handed over to the new company on the 1st of August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

“ Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr. Henry Edmund Gurney and Mr. Robert Birkbeck) will also occupy the position

of managing directors, and undertake the general conduct of the business.

"The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment.

"The directors will give their zealous attention to the cultivation of business of a first-class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders.

"Copies of the company's memorandum and articles of association, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company."

It is to be observed that at the time the prospectus was issued counsel had not agreed as to the terms of the second deed; and therefore the first only was referred to in the prospectus. It is now necessary to state the effect of both these deeds.

The first deed—the deed of transfer—provided for the transfer of the business and the good assets, or the assets not excepted. The first clause ran thus: "The vendors agree to sell and transfer, and the purchasers agree to take, accept, and purchase as a going concern, on the 1st day of August now next ensuing (being the day of completion hereinafter mentioned), the business of bill brokers and money dealers now carried on under the said style or firm of Overend, Gurney, and Company, and the goodwill thereof, with the benefit of the said style or firm, and the sole and exclusive right of thereafter using such name or style, and all gains, profits, emoluments, benefits, and advantages which shall, can, or may arise, or be had, gotten, or received from the carrying on of the said business on and from the said 1st day of August next, at or for the price or sum of 500,000*l.*, to be paid and satisfied by the said limited company to the vendors, or allowed in, or brought into account between them as hereinafter mentioned, and under and subject to such other terms and stipulations as are hereinafter expressed or contained."

The third clause provided: "The said limited company shall, on and from the said day of completion, inclusive of such day, carry on the said business, and shall be exclusively entitled to all gains, profits, emoluments, benefits, and advantages, &c.; and, save as hereinafter provided, shall bear the losses, if any, which shall arise on the transactions entered into by the company."

The fourth clause provided that the firm should be satisfied half by shares and the remainder by being brought into account.

The fifth clause provided that the price of the goodwill might be retained by the company as a material guarantee for the performance of the vendors' covenants.

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The sixth clause pointed to certain accounts to be excepted. It provided that—"Except such accounts as the directors of the said limited company shall require to be reserved or excepted to be wound-up and closed by Overend, Gurney, and Company, as hereinafter provided, all accounts connected with the said business which, at twelve o'clock at midnight of the 31st day of July inst., shall, as appearing by the books of the said Overend, Gurney, and Company, be opened or unsettled, and subsisting between Overend, Gurney, and Company, and any other person or persons, whether a balance shall be struck thereon or not, save and except accounts subsisting between Overend, Gurney, and Company, and other person or persons, which shall be confined to moneys held by them on deposit or at call, on which no interest shall have been actually paid by Overend, Gurney, and Company for the period of six years and upwards, next immediately preceding the said day of completion, shall be carried on and continued between the said limited company in the place of, and by way of substitution for, Overend, Gurney, and Company, and such other person or persons so far as such other person or persons shall not dissent therefrom, as the same might have been continued and carried on between Overend, Gurney, and Company, and such other person or persons."

The seventh clause provided, as to the doubtful assets, "that the company shall, save as is hereinafter provided, with respect to the bills, notes, securities, and property held by the vendors to the credit of, or on any of the accounts which shall be reserved or excepted, to be wound-up and closed by Overend and Company, as hereinafter provided, be entitled to the benefit of all securities," &c.

By the eighth clause the company were to repay all moneys held by the vendors on call or deposit; and by the eleventh clause the vendors gave the guarantee referred to in the prospectus: "The vendors guarantee the company that, irrespectively of any value to be attributed to the goodwill of the business, their assets, of which the company shall take the benefit, shall, upon the actual realisation, produce a net amount of money equal to the amount of the moneys which the company may have to pay in discharge of the obligations of Overend and Company."

And in particular, as to debts due to the old firm, they guaranteed, in the next clause, as to other assets not excepted, "That all debts due to them which shall be taken over by the company shall be paid in full."

Then the eighteenth clause provided against the transfer of the excepted accounts "that the vendors shall continue to act for the purpose of winding-up, liquidating, settling, and arranging any accounts, debts, liabilities, or affairs connected with the business of Overend and Company, which the directors of the company should deem it expedient should be liquidated or wound-up by the firm; and all bills, securities, or property held by the

vendors on any such accounts shall be transferred to the company as part of the assets; but the same shall be reserved and excepted by Overend and Company, to be retained and disposed of by them for the purpose of winding-up the accounts," &c.

Such was the scope of the first deed, which was referred to in the prospectus, and deposited at the office for inspection. The scope of the second deed, which was not settled by counsel until the 27th of July, some time after the company was formed, just before the allotment, was as follows. It recited the first, and deposed and declared "That the 'suspense period' (established for the excepted accounts) should be three years and a half; and that the excepted accounts should mean the accounts which the directors should deem it desirable should be wound-up by the firm."

It provided that a suspense and guarantee account should be opened; and that it should be debited with the excepted accounts; and that the amount so to be debited should be considered as representing and equivalent to an amount due to the company from the vendors, but to be liquidated in account current between them. It was provided that the excepted accounts were to comprise all such accounts as can be comprised within the general description set forth in the schedule. Another schedule accordingly gave such "general description" in these terms:—"All accounts between Gurneys and the Millwall Iron Steam Company [no amount being mentioned]. All accounts between Gurneys and any company, firm, or person whose affairs are in course of being wound-up, settled, or arranged, &c. [the very terms used in the first deed]. All accounts between Gurneys and any company, &c., in respect of any advances made by Gurneys upon shares of any company wound-up, &c. All accounts in respect of any unrealised property or securities taken by Gurneys may open account between them and any person."

It will be observed that there was only (in the language of the deed itself) "a general description" of the assets thus excepted; the bad or doubtful assets, and no enumeration of them; nor any mention of accounts; so that from this deed no more than the other could any information be obtained as to the amount of the doubtful or deficient assets; and, on the other hand, the first deed and the prospectus disclosed that there were or might be deficiencies in the assets, and that there were to be assets excepted or objected to by the directors of the company.

The deed further provided as to the suspense and guarantee account thus to be opened with the vendors, that they might place to its credit the million due to them on their private accounts and the half million for the purchase money; and that all sums realised on the excepted accounts should be carried to its credit and be actually paid over to the company; and that if at the end of the suspense period there should be any balance on the debit side, the vendors should pay it to the company.

Upon the deeds being read,

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COCKBURN, C.J., thus stated their effect:—The first deed (he said) refers to the excepted accounts, and then shows that, although all the assets are to be transferred, it is subject to this, that such assets only are to be transferred as the new company may think it proper to undertake. As I understand it, by the first deed all the assets and liabilities are to be transferred to the new company, subject to a certain guarantee as to the value of the assets, but the first deed contemplates a power in the company to reject such of the assets of the firm as they may not think it expedient to take. Then the second deed provides for what shall be done with reference to those assets which the new company decline to take. Then there is a provision that, with reference to all such accounts as are enumerated in the schedule, the company shall get what they can from them; and then the second deed limits the time for doing so to the three years and a half. The old firm guarantees to the new that all assets realised shall be paid to the new; and that at the end of three years and a half the difference between the assets realised and the nominal value shall be paid by them out of their own private funds. Its value to the company depended practically on the sufficiency of the guarantee. As I understand it, part of the terms of the contract between the old firm and the new company was, that the old firm should transfer to the new company all the assets. If these doubtful assets of 4,000,000*l.* were really so much money, there would be a transfer at once of assets to that amount; but it was doubtful whether these 4,000,000*l.* of nominal assets would realise anything like that large sum. Therefore, the old firm said, we will make over to you all our assets, but these being doubtful, we will bind them up, and if, in the end, it turns out that they are worth less than their nominal value, we will guarantee you that we will make good the difference. It comes to this, that the company were to have all the assets, but as there were some doubtful, these were not to be made over, but that if anything was to be realised upon them, it was to be paid over, and the whole was to be guaranteed. In other words, they guaranteed(*a*) that these assets should realise the amount. Such was the substance of the two deeds, the first of which, according to the prospectus, was deposited at the office. Hardly any of the shareholders, however, went to see it, and of these only one appeared to

(*a*) In the course of the Lord Chancellor's judgment in the case, he thus expressed his opinion as to the effect of the proposed scheme: "The scheme would be reduced to this. We are in a state of insolvency to the extent of 2,000,000*l.*, but we have these 4,000,000*l.* owing to us. We must have time to get these 4,000,000*l.* in: we will set off our 1,000,000*l.* which is due to us as partners against that collection of debts; we will deal with the 250,000*l.* also as entering into that account, and so far reducing the amount which we are ultimately to pay to you. During the suspense period we will try if we can get in these 4,000,000*l.*, or we will get in as much as we can, and at the end of the time we will guarantee you the difference. . . . The company must take the consequences of having intrusted their moneys to persons of sanguine temperament who have made a purchase which turns out to be a bad one; but I do not find enough in this case to show me that it is so ridiculous or absurd, or that there is such *crassa negligentia* as would amount to fraud."



have read it; and he did not attend to it sufficiently to observe the allusions to excepted accounts. The prosecutor had not even looked at it; and he had even read the prospectus with so little attention that he was under the impression that it stated positively that only 15*l.* a share would be called up, whereas it only stated that no more was intended to be called up. Neither he nor any other of the shareholders appeared to have observed the allusion in the prospectus to a guarantee of any deficiency in the assets transferred.

It was proposed to ask the prosecutor and other shareholders called whether, if they had seen the second deed, it would have deterred them from taking shares; but

The *Solicitor-General* (Sir J. Coleridge), Sir J. *Karslake*, and *Mellish* objected; and

COCKBURN, C.J., after consulting Hannen, J., and taking time to consider, held the question inadmissible.

The prosecutor and other shareholders admitted that, if the prospectus had mentioned both deeds, in all probability they would have looked at neither.

The second deed was not completed until the 27th of July, when the allotment was nearly completed. Both deeds were dated of that day, but were not really executed until more than a week later. In the mean time the allotment was completed. The shareholders, whose names were laid in the indictment, including the prosecutor, all (except one) bought their shares afterwards, and were not original allottees, so that they did not, with that exception, take their shares from the directors, the defendants.

Just after the execution of the deeds there was the usual application to the Stock-Exchange Committee for a settlement day. They, in reply, made the usual application for the proper documents relating to the formation of the company. The directors, by a minute, directed that the secretary should apply to their solicitor, who gave him the articles and memorandum of association, the prospectus, and the first deed referred to in it. In doing this, he said, he acted on his own responsibility, without any specific directions or instructions and merely because it was the only deed referred to in the prospectus, and because it contained the terms of the transfer, which were all that he deemed material. The secretary of the Stock Exchange stated that they would have expected to see any deed containing covenants relating to the transfer of the business or the business transferred. There was no evidence to affect any of the directors with suppression of the deed.

After the transfer, the amount of the suspense and guarantee account was reduced by credits, but increased by further advances on the old accounts; and at the time of the failure of the company the deficiency upon it was nearly 3,000,000*l.*

Evidence of further advances on the old accounts was given as evidence of fraud, but

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COCKBURN, C.J., observed that in that point of view it was exceedingly remote.

Moreover, explanations were given, whence it appeared that these advances were for the purpose of winding-up the accounts; as, for instance, to clear off incumbrances on securities, &c.

It was attempted to prove one of the debts fictitious, but the attempt failed; and there was no other evidence of actual or intentional fraud offered, or attempted to be offered.

After the transfer, the company carried on the regular business for some months, from the 1st of August, 1865, to the 10th of May, 1866. Down to that day there was no deficiency in assets so as to stop discounts; and discounts to the amount of nearly a million took place within the last ten days. But during the last four months of the company's existence the rate of interest rose from 3 per cent. to 9 per cent.; and the consequence was that, though the amount of business was the same, it produced no profit, as bills could not be rediscounted, except at a loss, and thus the available working capital was reduced, and profits were destroyed. Moreover, a panic arose, in consequence of which 4,000,000*l.* of deposits were withdrawn, and the company at the time of stoppage were 5,000,000*l.* the worse; that is, there was an excess of 5,000,000*l.* of deposits withdrawn over deposits made during that period. The result was that on the 10th of May, 1866, the company had to stop, and was put in course of liquidation. Owing to the same cause the assets and estates were not realised according to the estimates, the estates being sold at a great loss under their value.

The shareholders having been called on to contribute to the payment of creditors, the result was a loss to the shareholders of nearly 3,000,000*l.* (about the amount deficient on the doubtful assets); that was the sum of which, according to the case for the prosecution, the shareholders had been "defrauded."

There was, however, no other evidence of fraud than as above stated.

At the close of the case for the prosecution,

*Mellish*, on the part of one of the defendants, one of the new directors, Mr. Barclay, applied to have an acquittal directed, on the ground that he was no party to the preparation or issuing of the prospectus, and had signed neither of the deeds, so that he had not been a party to any overt act of fraud.

COCKBURN, C.J., however, observed that, assuming the conspiracy alleged, any one who was a party to it might be liable for overt acts of the conspirators to which he had not been privy, provided that they were in pursuance of the previous design. He therefore declined to direct the acquittal of a defendant on the ground suggested.

The *Solicitor-General* (Sir J. Coleridge) then addressed the jury for the defendants, who were members of the old firm; the vendors urging that there was not only no evidence of fraud, but that all the evidence disproved it, and that the case for the

prosecution rested upon manifest fallacies—the fallacies of an accountant. Including the private assets, there was no deficiency and no insolvency; there was no fraudulent suppression of the fact of a deficiency in the trade assets; on the contrary, it was distinctly indicated on the face of the prospectus and on the face of the first deed. The second deed in reality disclosed no more than the first, and at all events there was no evidence of any fraudulent suppression of it by the directors; on the contrary, it was disproved. Their estimates were fair and honest; and on those estimates there was no deficiency; and the reason of the ultimate deficiency was that the estates were realised in a period of depression caused by a panic; and the real cause of the ruin of the company was the withdrawal of deposits in consequence of the panic.

Sir J. *Karslake*, *Mellish*, and *Giffard* addressed the jury on behalf of the other defendants, the new directors, urging the same topics; and, in addition, urging that they could have had no motive to join a concern they believed to be worthless, and thus risk their ruin; and that therefore it must be presumed that they believed the concern profitable, a belief extremely reasonable and natural. The deficiency in the assets were from the necessity of selling at a loss, and that necessity was caused by a panic, and the consequent withdrawal of 5,000,000*l.* of deposits.

At the close of the case, which lasted nine days,

COCKBURN, C.J., summed it up to the jury as follows:—My first duty will be to state to you the law upon the subject; and, in the first place, let me draw your attention to the indictment upon which these defendants are put upon their trial. It contains various counts, between some of which and others it is necessary to distinguish with regard to the cases of the several defendants. The first six counts of this indictment are framed upon a recent statute (the 24 & 25 Vict. c. 96, s. 94), which, provides that, “Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the court to any of the punishments which the court may award, as hereinbefore last mentioned.” After those counts, framed upon that statute, there follow counts for a conspiracy to publish a prospectus with intent to deceive and defraud. These counts being for a conspiracy to commit the statutory offence to which I have just been referring, the counsel for the defendants are, no doubt, right in supposing that they were introduced for

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the purpose of meeting the possible defence that the defendants, having been put upon their oaths in proceedings in the Court of Chancery, might have had an answer on the statute, inasmuch as it contains an express provision of indemnity in respect of matters which have been disclosed by directors or parties in a similar position in the course of such proceedings. The only material difference in the present case is this, that one of these defendants, Mr. Barclay, cannot be convicted upon the first six counts—and, if the case had rested upon those counts, I should, when application was made by his learned counsel on his behalf to me, have directed an acquittal—because it is quite clear, upon the evidence, that Mr. Barclay had nothing to do with the publishing of this prospectus. Having become a member and a director of the company, he left the country before the prospectus was taken in hand; and, therefore, he cannot be convicted of having published or concurred in publishing the prospectus in question. But when we come to the counts for conspiracy, the case stands otherwise; and I could not consent, therefore, to the application that Mr. Barclay should be at once dismissed from this trial. For if once a conspiracy to do an unlawful act exists, and that conspiracy is to be carried out by such means as will effectuate its accomplishment, whatever is done by any of the parties to it, with a view to further and carry out its objects, is the act of all; and, therefore, if you should be of opinion by and by that there was a conspiracy here to carry out the fraudulent purpose ascribed to these defendants, and you believe Mr. Barclay to have been a party to that conspiracy, the publication of the prospectus being alleged to have been an act done in furtherance of the conspiracy, Mr. Barclay will be liable, like the rest, to be convicted on the conspiracy counts. Besides the counts for conspiracy to commit the statutory offence, there are some more general counts for conspiracy—one for a conspiracy to publish a prospectus known to be false, with intent to excite in the public mind a belief that the company was carrying on a prosperous business, and that its affairs were in a sound and prosperous condition, with intent to induce persons ignorant of its condition to become shareholders; and that the defendants did thereby induce Dr. Thom, the prosecutor, to take shares. There are similar counts with respect to other parties. Now as to these counts, I must tell you that, with the exception of one or two of the persons to whom these counts individually refer, I am of opinion that these counts cannot be sustained. I quite agree, as I shall presently more particularly point out, that where there is a conspiracy to defraud the world at large, it is quite enough that a person is induced to part with his money to entitle him to say that there has been a conspiracy against him. But with regard to the case of Dr. Thom, and several of the other parties, they were not brought into contact with the defendants at all. They did not take their shares from the company; they went into the market, and bought from other persons. Their vendors might have said, "There was a conspiracy to defraud

us ; ” but it cannot be said that there was a conspiracy to defraud individual persons who never were brought into contact with the company. The conspiracy was to defraud those who would part with their money as the price of the shares and hand it over to the company as the recipients of the price. Not, however, that this will make any material difference in this case ; because there certainly is one person of those to whom these counts relate who bought immediately of the company—I mean Mr. Beard ; and of course a conviction on one count would be just as good as a conviction on the others. Therefore, although I think it necessary to point out the distinction as I go along, it would have no material influence on the ultimate decision of this case. There is then a general count for conspiracy to publish a prospectus known to be false in material particulars, with intent to defraud and deceive generally, and to induce persons to become shareholders. Then there are certain counts for obtaining money by false pretences, first from Dr. Thom, and then from the other persons who bought shares, and whose names have been introduced in the course of this discussion. Here I again make the distinction, which I have before pointed out. Then there is a count—the last count in this indictment—which is general in its terms, and which sets out the particulars in which the prospectus is said to have been false and fraudulent, and to which therefore I will call your attention. It states that the defendants were directors of this company ; that they contracted to purchase a business of no value from Samuel Gurney and others who were unable to pay their debts ; and that, contriving to make it appear to persons willing to purchase shares that the pecuniary affairs of the company were prosperous, and the business of the firm solvent and prosperous, and intending to deceive persons who should become shareholders, they conspired to publish the prospectus, and, with intent to deceive persons willing to become purchasers of shares, falsely pretended, first, that it was not necessary to call up more than 15*l* a share ; secondly, that the pecuniary affairs of the firm were prosperous ; thirdly, that the business was worth 500,000*l* ; fourthly, that three members of the firm had consented to join the board, and would retain a large pecuniary interest ; and that the defendants did, by the false prospectus and false pretences, induce Dr. Thom and others to purchase shares. Gentlemen, that count contains really the substance of the charge against the defendants on the present occasion ; and the charge spread over the numerous counts of this indictment and reproduced in a variety of forms, really in substance is that which was stated to you by the learned counsel for the prosecution in his opening. It is in substance this, that the business of Overend, Gurney, and Company being hopelessly insolvent and worthless, these defendants, knowing that fact, conspired to induce persons to take shares in a new company, to which that business should be transferred, with a view of defrauding and cheating the persons so taking and paying for their shares of the price which they would

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have to pay. That is the sum and substance of the charge. If you shall believe in the end that such a conspiracy did in fact exist, that this business was worthless, that the defendants knew it to be so, and knowing it to be worthless as of value, disposed of it with intent to defraud the intended shareholders of the price they were to pay for their shares, there can be no possible doubt that they have committed an offence against the law. For not only does the act of Parliament to which I have called your attention make, whether the result of a conspiracy or not, the publishing of statements known to be false, in order to induce persons to take shares, an offence, but there can be no doubt, upon the general law of the land, that a conspiracy to defraud and cheat by means of false pretences is an offence, and an offence of a very serious nature. It is not the less an offence because it is directed against society at large, and because there the machinations of the conspirators may not have been directed against particular individuals. If a number of persons combine and confederate to cheat a particular individual, there can be no doubt that that is a criminal conspiracy at law. It is not the less so because the individuals to be caught and to be deceived are not individually in the eye and contemplation of the conspirators. That was settled long ago in the case to which the learned counsel for the prosecution referred, the case of *Rex v. De Berenger and others*; and whatever remarks Mr. Solicitor-General may have made—and I do not at all controvert what he says—to show that the verdict in that case was unsatisfactory, yet there can be no doubt that, when the Court of King's Bench came to consider the law upon the subject, their decision was founded on sound and wise principles, and that it has since been received and ought to be received as law—namely, that it is not because a conspiracy to defraud is directed against the general public, that it is the less an offence, by reason that you have not in your eye a particular individual who is to be defrauded. Independently of which it is quite plain that any conspiracy having for its purpose to defraud those individuals of the general public who may be caught by it, is a continuing conspiracy until it shall have arrived at its accomplishment and completion. As soon as the particular individual is brought into contact with the conspirators, the conspiracy, which before was general, becomes, in this case, if I may use the expression, individualised and fixed; and that which was a conspiracy to deceive the general public becomes a conspiracy to deceive and defraud the particular individual. Therefore, gentlemen, if you should come to the conclusion by and by that this charge, as I have stated the substance of it to you, is made out, you need not trouble yourselves about the counts in this indictment. There are counts in it which will sustain the charge, and in pronouncing a general verdict of guilty, you need not trouble yourself with distinguishing between one count and another, although I have thought it my duty to point out what were the specific charges which are brought against these defendants. Now, gentlemen, while I have stated



the law to you as I conceive it to be, I must take the earliest opportunity which the case affords of pointing out to you a distinction which it is most material you should bear in mind. We are not here to inquire into the propriety of the proceedings of the defendants. We are not here to inquire whether there may have been misrepresentations or concealment of which the shareholders might have availed themselves in a civil proceeding. It may be that there was such a degree of misrepresentation as that, if an action had been brought upon an implied warranty, the shareholder might have been entitled to recover back the price he had paid: it may be that, alleging that the consideration for which he paid his price had wholly failed, he might have been entitled to recover back that price: that, if an action had been brought to enforce calls, he might have had good ground for resisting the payment asked for. That is not what we are inquiring into. In order to convict the defendants upon this indictment, you must be satisfied that there was a deliberate design to deceive and cheat the public, or such individuals of it as should lend themselves to the purpose. Unless you are satisfied of that, you cannot convict the defendants upon this indictment. In consequence of one or two observations addressed to me, either orally or in writing by some members of the jury, it has occurred to me more than once that possibly you have not this distinction sufficiently in your minds. In a case of this kind, we are, as it were, upon the very confines which separate the civil and the criminal law; and we must take care that we do not overstep the boundary line. It is one thing that a man may make himself liable to an action, or may be liable to have a contract which he seeks to enforce held to be vicious and bad, because he had stated something which went beyond the exact line of truth, or has concealed some material fact which ought to have been made known to the other contracting party: more than this is required to support this charge. A man may honestly misrepresent, that is to say, he may state as true something which he believes to be true, but which turns out to be untrue. If he has given a warranty, or has entered into a civil contract upon the assumption of the fact in question, he may be liable in a civil action to be defeated, but that would not be sufficient for the present purpose. Here you must be satisfied that that which is alleged to have been misrepresented was known to the defendants to be false, and that, acting upon that knowledge, and with the deliberate intention to deceive and defraud, they did that which is alleged to have constituted the criminal offence on which they are now put on their trial. Having pointed out these distinctions to you, I go back to what I before told you is the real charge in this case, and you will see that it involves four questions. In the first place, and this is one of the greatest possible importance, what was the state of the business of Overend, Gurney, and Company? Was it the worthless, hopeless, insolvent business which, on the part of the prosecution, it has been represented to you to have been? If it

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was, was its condition known to the defendants? If it was, have they misrepresented its state and condition to the world? If so, what was their intention? Was it thereby to deceive persons into taking worthless shares and paying for them in money, which money was to be appropriated to the benefit of the defendants? These are the questions which appear to me to be all important in the present case, and I will take them in the order in which I have placed them before you. In the first place, was this business at the time of the transfer, the worthless business which the prosecution has represented it to be? In order to determine that question, it appears to me necessary to go somewhat back into the history of this mercantile establishment. That the house of Overend, Gurney, and Company was doing a vast, I had almost said a gigantic business, for very many years, is a fact too notorious not to be within the knowledge of every one of you. But it is not unimportant to turn to the figures, in order to see what was the amount of business actually done by that house. Now it appears that during the six and a half years which elapsed from the year 1859 to July 31, 1865, both inclusive, the amount of money turned over in that establishment amounted to 1,115,876,172*l.* From 1859 to 1864, both inclusive—I leave out now the last six months which were included in the former figures—the amount of money turned over was 9,385,000*l.* in round numbers, and the profits appear to have been in proportion to the vast amount of business done. In 1851, 156,769*l.*; in 1852, 186,386*l.*; in 1853, 212,977*l.*; in 1854, 153,500*l.*; in 1855, 155,256*l.*; in 1856, 148,617*l.*; in 1857, 144,460*l.*, that being notoriously an unfavourable year; in 1858, 293,628*l.*; in 1859, 442,074*l.*; in 1860, 343,373*l.* Now this amount of profit appears to have been divided into two branches, one being appropriated to the amount to be divided for the profit of the different partners, the other to be carried to a reserve fund. It stands, as the ultimate result, that, upon an average of these ten years, there was an amount of 220,000*l.* a year of profits; and, although there was no division of the profits in the two years, 1853 and 1857, yet there was on the ten years, an average division among the partners of 136,000*l.* per annum. I have taken you through the table of profits for the ten years down to 1860, inclusive. The next remarkable feature in the final history of this case is this, that from that period down to the termination of the business of Overend, Gurney, and Company, Limited, the working earning power appears never to have undergone the slightest diminution; and yet, during 1860, 1861, 1862, 1863, 1864, and the half of 1865, no profits appear ever to have been divided. The reason of that is now well known. The fact is that the firm had sustained most grievous losses by reason of the most wild and insane speculations. I presume that about 1861, although there was the usual amount of business done, from which, under other circumstances, a large amount of profit would have resulted, the capital began to be absorbed by

these extravagant speculations, and from that time there were no profits divided, and by the middle of 1865 a state of things had arisen, that upon an account of 15,000,000*l.*, in order to balance the two sides of the account, and to make the assets correspond with the liabilities, it was necessary to set down to the score of assets a sum of 4,213,896*l.*, which consisted of bad, or at all events of doubtful, debts. Not, indeed, that the whole of the sum of 4,213,896*l.*, which constituted the present deficit, was at that time believed to be what I may call a permanent deficit. It was anticipated and believed, so far as I can judge, that upon that sum of 4,213,896*l.*—call it for the sake of brevity in round numbers four millions of bad and doubtful debts—there would be a sum of one million in round numbers to be recovered. But, even thus, there stood upon the books of the company a deficit of at least three millions of money. Under these circumstances, what was to be done? It is clear that upon an account of fifteen millions, a deficit of three millions is neither more nor less than insolvency. What, then, was to be done? It was plain that at any moment any alarm in the public mind about the position of Overend, Gurney, and Company, or any one of those crises which from time to time take place in commercial history, and which might cause a run upon this establishment, would bring it down with a crash. At all events it was clear that it was insolvent. It might have gone on. One of the liquidators, I think Mr. Harding, said that he saw no reason why in this state of affairs the old firm should not have gone on. But would it have been right for them to do so? I think most assuredly not. A business which is conducted with other people's money, such as the business of a banker or of a dealer in money, if it comes to that pass that there is so large a deficit as to amount to insolvency, ought at once to be brought to a close. The man who takes your money or mine, which he is bound in honesty as well as in law to restore, when he knows he is insolvent, and that if he should be called upon by all his creditors to pay them to-morrow he could not do it, commits a fraud upon us. I think, therefore, the firm was perfectly right in declining to go on under those circumstances; and Mr. John Henry Gurney was perfectly right in declining, as we find from his uncle's letters that he did, to continue the business of Overend, Gurney, and Company, under the then existing circumstances. But, then, what was to be done? There was one alternative, which is that which Dr. Kenealy, on the part of the prosecution, said ought to have been adopted—namely, bankruptcy. They might have become bankrupt, and paid what they could in the pound—realised upon their large estates, and paid their creditors as far as the assets of the firm and their own private property would go. But I cannot help thinking that we ought to make some allowance for men who, under the circumstances in which the defendants—at least the old firm—were placed, hesitated to adopt that alternative. The effect of it must of course have been to destroy the concern; the

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business would have been scattered to the winds, the name would have been lost, and this was what men in the position of the Messrs. Gurney, with such a business, with such a name, would naturally shrink from if it could possibly be avoided. One cannot blame them, therefore, if there were any other course open to them, that they did not adopt the alternative which it is now suggested they should have pursued. What, then, is to be done by a man who has a good business, but who by some unforeseen circumstance—the failure of debtors, or the failure of enterprises in which he has embarked capital—finds himself in a position in which he cannot balance the two sides of his accounts, and who, therefore, if he were called upon to meet his creditors to-morrow, would not be in a position to do it? What is the course to be adopted under those circumstances? You may either sell your business for what it will fetch, but which may possibly involve a considerable sacrifice—or you may do—what I believe is the course usually adopted under such circumstances—endeavour to obtain some new partner or partners who will bring in capital to supply the existing deficit, and to whom you, who were before the sole and exclusive proprietor, must then make over a portion of it in consideration of the price which they pay, in order to effect the restoration of the business to its full activity and power. Now, nobody, I think, can doubt that such a course is perfectly legitimate, provided always that the man who has to dispose of the business, or who has to take in fresh partners, is perfectly honest and open, and fully makes known to the person with whom he proposes to have one or other of these transactions, all the circumstances which are necessary to enable the person who is to buy the business or to come into it, fully to appreciate all its merits or demerits, what he takes upon himself in the shape of liabilities, and what he is likely to realise in the shape of prospective advantage. But if, on the other hand, the person who finds himself in the position to which I have referred is guilty of deliberate misrepresentation for the purpose of fraud; if he knows that his business is not only insolvent for the moment, but that it is to all intents and purposes unsound and hopelessly insolvent, if he misrepresents its true state or has recourse to artifice or concealment to prevent the other party from knowing what is the true condition of things, he is guilty of fraud; and if a body of men combine to carry out such an iniquitous proceeding they are guilty of a conspiracy in the eye of the law. You must, if you please, take pains to form your own judgment as to which of these two courses it was which the defendants in this instance pursued. Now, they made up their minds to dispose of this business, but, at the same time to retain an interest in it. They proposed to dispose of the concern to a Joint-Stock Company, but to take a given number of shares in the undertaking themselves. In what form and in what terms ought they to have made the proposal to those whom they invited to join them in the new undertaking, so as to make the true state of the case per-

fectly intelligible and known to the persons with whom they were dealing? Suppose the case were between one or two individuals possessed of such a business and one or two others to whom they proposed to join them in their business, what would they say? "Here is a business of vast earning power, capable of producing, and which has produced during a series of years, such and such an amount of profit; but it is crippled by losses which have absorbed a portion of its capital, and it is not in a present position to go on as it ought to do: upon an account of fifteen millions there is a present deficit of four millions, and an eventual deficit of three millions. We propose to sell this business and to take a share in it under the new form. With regard, however, to three millions we will reduce it thus: we are creditors of the partnership in our individual capacity to the extent of one million in round numbers; that million stands upon the debtor side of the account, and it is by reason that it so stands upon the side of the account which represents liabilities, that after we shall have taken credit for the million which will hereafter be realised upon the bad debts there will still remain a deficit of three millions. Now, we propose to you that, instead of this deficit thus standing at three millions, we will write out the million which stands to our private credit and to the debit of the firm, the effect being that if that million be deducted from the amount of liabilities the latter liabilities will be reduced to two millions. That being so, we ask 500,000*l.* for the transfer of this business." Still, you see, there would remain the deficit of two millions. But suppose the old proprietors should say this: "You know who we are, you know that we are men of great wealth, of large landed and personal property, that we are good for two millions: we will guarantee that in a certain space of time, namely, in three and a half years, whatever shall prove deficient upon the assets now standing in the account we, out of our private property, though it may cost us the sacrifice of every shilling's worth of it, will make good the deficiency, so that none shall remain." But then they would be told—true it is that upon the present state of the firm's accounts in the way you represent things there will be a deficit only of two millions, and true it is that your property may be sufficient to cover that deficit; but in addition to the actual existing liabilities there is a large amount of contingent liability, namely a million which you have guaranteed to other parties, and your private property, though it may be worth two millions, would have to be answerable in respect of those guarantees, just as much as according to your proposal it would be answerable for the deficit in our account. This would, no doubt, be true; and the result would be, that the property being valued at two millions, and there being an admitted deficit of two millions, there will only be sufficient to satisfy one million of that deficit. The result of these things, therefore, is that there would still remain a deficit of a million. This I take to be the result of these figures, assuming—a question to which I shall come presently—that these figures are such as

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you can rely upon. The present deficit of four millions, reduced to three millions by the estimated value of the doubtful debts, is again reduced to two millions by striking out from the liability side of the account that which stands in the private ledger as due to the individual partners, and to meet that deficit of two millions, you have the guarantee of all the property of the old firm. But the value of this property, on the other hand, is again reduced in value to one million by reason of the guarantee given to other parties to the extent of a million. That being so, the property of the firm would be effectual as a guarantee for one million only, and that there would be still a deficit of a million. Now, gentlemen, suppose that that is the result of the figures, and that there is a deficit of a million, which is certain to fall sooner or later upon the new partners whom it is proposed to introduce. Was this business, to the persons to whom it was proposed to come into it, of sufficient value to make it worth their while to put down a million of money in order to meet the existing deficit? To make the proposal more palatable the old firm further offers this: the business is worth at least 500,000*l.*, after taking all the drawbacks which can possibly attach to it into consideration, and we ask you 500,000*l.* for it; but we will do this with you; we will not ask you to pay a farthing of the amount in cash; we will dispose of it in this way: 250,000*l.* shall simply be ours on paper against the guarantee which we give you to make good out of our private property the deficit which will remain. We will agree to write the 250,000*l.* off against that guarantee; you will, therefore, not have to pay us a farthing of it in cash. As regards the other 250,000*l.* we will take it in shares, upon which 15*l.* shall be taken to have been paid up. The number of shares which you will thus appropriate to us will make up this 250,000*l.*; but, even then, we don't ask you to hand over the shares to us; they shall be hypothecated to the same guarantee, they shall remain in your possession, and if we fail in any of our engagements to you, you shall be at liberty at once to turn these shares into money, to take them into the market and dispose of them at what price you can get, and you shall set off the proceeds against whatever claim you may hereafter have upon us. The result then upon this arrangement is, that the business, with its working and earning power wholly undiminished, is, according to the terms of the bargain, to be transferred to the new proprietors without their having to pay to the old one a single farthing in the shape of cash; but the latter have to introduce a million in order to make good the deficiency which may be calculated to remain after everything has been done which could be done on the part of the old firm to liquidate the amount of deficit which would still remain. Was this a worthless thing, or was it not? Now that is a matter, gentlemen, which you are so fully competent to judge of that I will not dwell longer upon this part of the case. If the earning power of this company was undiminished, if the profits which they had made in past years, when it was not



hampered by all the dead weight of this unfortunate mass of bad debts arising from imprudent speculations were capable of being made again—if its power of earning profit, which you may take at something like 200,000*l.* a year or very near it, remained as it was before, and what was required—there being no present outlay of cash to satisfy the past proprietors—was simply the introduction of a million of money to cover the eventual deficit, and to enable the company to go on—was it worth any one's while to give that million of money so to be introduced into the business? a question to be determined, I apprehend, by the business which would be done, and the amount of profit which would be realised in the working of that business. Suppose that one of you had been a large capitalist—I mean a capitalist to whom hundreds of thousands are as nothing; and that not yet tired of business you had been disposed to apply your capital to what appeared a prudent and advantageous speculation, and that the affairs of this company, as I have just placed them before you, had been brought to your knowledge, and you had been told that you need not pay a single shilling of the price down, but that it would be necessary for you to introduce a million of money into the business to enable you to go on, and that then, upon looking to the affairs and the accounts of the company, you had seen that it had done for years the amount of business to which I have referred, that it had done that during a long series of years, until it got into these difficulties, arising from special circumstances having no connection with the legitimate or proper business of the firm, and you had found that it had made that amount of profits and you had had a million at your disposal, would you have thought it worth while or not to enter into the speculation, or would you have treated a proposal to you to enter into it upon those terms as a delusive and fraudulent proposal, intended only to cheat you out of the money you were to introduce? And, observe, that having brought the balance, the ultimate deficit, down to a million, as I think these figures do bring it out, the sum which the new company or the new shareholders were to introduce was just the very sum or only a little in excess of that to which I have been referring, namely, 1,250,000*l.*; that was the sum which the shareholders were to bring in. The total amount you know was to be 15*l.* paid upon each share, or 1,500,000*l.*; 250,000*l.* of that was to be written off, or, at all events, locked up, as regards the shares which would be allotted to the three original old proprietors. Then there remained a balance of 1,250,000*l.* which the shareholders would have to bring into this concern in order to balance the deficit which it was contemplated would eventually remain, and to enable the business to go on without any difficulty or apprehension of any impending danger. Of course, gentlemen, everything turns upon whether these figures can be relied upon or not. The learned counsel for the prosecution would here interpose and say, granted that if these figures are correct and you can make out

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that all that was wanted was the million in order to set a business going which was capable of producing 200,000*l.* a year, although every one might not perhaps like to enter into such a speculation, no one can well say that such a proposal was fraudulent, or that such an arrangement and bargain, if made, was a mere handing over of a worthless and hopelessly insolvent business. But then, the learned counsel says, "I deny the accuracy of those figures. In the first place, the assets were estimated at a million; but they produced, when they came to be realised, only half that amount. The private fortunes of the old partners were estimated at 2,200,000*l.*—call it in round numbers two millions—and they have produced only 700,000*l.* or 800,000*l.* And that as to the earning power of the business, you talk of its profits; the real fact is, that the business collapsed from its own inherent rottenness in the course of nine months after the new company was called into existence." In the first place, when it is said that the private estates of the old partners only realised 700,000*l.* or 800,000*l.*, we must add to that a sum of several hundred thousand pounds—in round numbers I may state it as half a million—which was realised before the fall of the company, and which was carried to the credit of the guarantee account; and yet it remains perfectly true that the assets and the private property have not realised by any means what was expected. But then we must take into account the circumstances under which they were sold. We are told that the circumstances under which they were realised were most disadvantageous, that the time has been bad for realising upon anything and everything, and that this applies both to the doubtful debts, and the securities held in respect of them, and also to the estates and private property of the partners. Now, you know, gentlemen, much better than I can pretend to know, from your own acquaintance with the commercial world, whether it is true that property which has had to be realised within the last two or three years has been realised under very disadvantageous circumstances. We know, from the history of the commerce and trade of this country, that occasional periods do occur in which, after great commercial activity, reaction takes place, when everything is as it were stagnant, when fortunes not being made, landed estates are not so much in demand, when, in fact, there are more sellers than there are buyers, and when goods and property of every description, especially if you have to realise under legal process or legal obligation, fetch far less than they would do if sold at a more prosperous time and under more favourable circumstances. We have been told by both the official liquidators, persons from their position well qualified to form a judgment upon such matters, that property of every sort and kind, especially property which had to be realised under such circumstances, has been sold at a very great disadvantage. Of that you will form your own judgment. Then, again, with regard to the collapse of the business as to which Dr. Kenealy has referred: undoubtedly it has collapsed. It collapsed at the end of

nine months; but was that owing to what has been termed its inherent rottenness, or was it owing to extrinsic causes? It certainly did not do less than it had done before, for we find that in a period of nine months 166 millions of money were turned over. You will find that in that time there were bills of exchange taken to the amount of fifty-six millions, which would be at the rate of seventy-five millions a year—an amount not exceeded, I think, in any of those years when the prosperity of the house was altogether untouched. The working power, therefore, being undiminished, I must say that I do not see how you can ascribe to the inherent rottenness of the concern the rapid termination of its existence, which took place in May, 1866. It has been pointed out, and very properly so, that whatever may have been the amount of business done during this period, the profits were, comparatively speaking, nothing. It does not appear that in that nine months the profits exceeded 4000*l*. But then it is said on the part of the defendants, All this is capable of easy explanation. We went on doing well until the month of January. From the 1st of August, in the preceding year, to the 13th of January, our deposits continued to increase, and our business sustained no diminution; but early in 1866 a combination of causes tended to work mischief to our concern. In the first place, the interest on money gradually increased; the difference was that between three and a half per cent., which was the interest on money when we began, and eight per cent., which was the height to which interest attained before we stopped. This will account for the poverty of our profits, inasmuch as a great portion of our business must be done by rediscounting; and if you have the rate of interest increasing upon you beyond that which you have asked for the bills you have taken, it is clear that, instead of making a profit, you must realise a loss. Therefore, say the defendants, the calamity of that period has a very powerful cause in preventing us from realising the profits we otherwise should have done; but the great cause which led to our downfall was the alarm which sprang up in the public mind, and which has nothing on earth to do with the intrinsic state of our business. About that time it began to be bruited abroad that some of the Messrs. Gurneys were realising their property. This inspired alarm and distrust; persons who had money standing with us immediately proceeded to withdraw it, and in the four months between the 13th of January and the 10th of May, when we finally stopped, no less a sum than four millions was withdrawn from our coffers, a sum sufficient to paralyse any establishment, no matter how sound, how solvent, or how flourishing it might have been. Gentlemen, if you believe the statement that four millions were actually withdrawn in the four months preceding the downfall of the company, I think we have a circumstance which sufficiently accounts for the catastrophe which followed. It will be for you, gentlemen, to say, under the circumstances, whether you can, as reasonable men, entertain any

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doubt that the statistic book does truly represent this part of the company's affairs, and that in fact there was withdrawn in the period to which I am referring, namely in the four months, a sum of four millions. In that case it will be for you to say whether you believe that the limited company broke down from circumstances necessarily inherent in its pecuniary constitution or whether it broke down from a combination of external causes which could not be reasonably anticipated at the time the bargain between the old firm and the new company was entered into. We are not now considering whether the old firm kept their books with that commercial accuracy, or according to that commercial practice, which you would desire to uphold, and I further must point out to you that these accounts of profits are of old date, going back as far as the year 1850 and 1851, and therefore, in whatever form they appear, can you doubt that those entries, which are found by the official liquidator in the account books of the company, are genuine entries and the true representation of what were the amounts carried to the account of profits at that time, or of the amounts which were divided between the partners as their respective shares? Now, it is perfectly true that we do not know exactly upon what basis the estimate of profit was founded. It may have been that it was more or less delusive; it may have been that the whole of the discount upon bills was carried to profit, while sufficient account was not taken of what may possibly have been the losses upon bad bills, which were not eventually paid. We do not know, we have no means of knowing, how that amount of profit to be divided between the partners or carried to the reserved fund was got at. It is one of the misfortunes of the case that we have no evidence to inform us. But even supposing that you should think that those amounts of profit appearing in the books are not altogether satisfactory, yet can you doubt that a business of that magnitude, in which such a large sum of money was turned over, and such a vast amount of bills discounted, could have been otherwise than a profitable concern, supposing that the transactions had been confined entirely to the legitimate and proper business of the company, and that its capital had not been diverted into other and illegitimate channels. A very competent witness, Mr. Harding, has told us, that in his judgment the profits to be made upon such a business may be fairly estimated at from 180,000*l.* to 190,000*l.* a year. At all events you can judge for yourselves—and that is the great advantage of having twelve gentlemen connected with the commercial world to try such a case as this—seeing that the amount of money turned over, the amount of bills discounted, and the amount of business done, stands upon figures that are not for a moment disputed. Judge for yourselves, making all due allowance for what you think ought to be taken off from these profits. If you have any doubt about the principles upon which the profits were ascertained or about the accounts in which they are entered, make any deduction or abatement you think proper, and then ask your-

selves whether, if this business was capable of earning such profit as you think it must have earned, the terms of the bargain were fraudulent, or were such as might fairly be proposed by persons who desired either to dispose of the business or to take fresh partners into it. But then it is said that the estimate of the property of the partners is altogether incorrect. I must here interpose to make an observation, which I trust will have its due effect. The learned counsel for the prosecution says, do not trouble me with estimates, do not talk to me about calculations; I look only, and I invite the jury to look only, to the broad facts and to the positive results. Here is an account showing a large deficit arising from bad debts. It is said to have been calculated that a million of money would be realised upon these debts: it has not been realised. Here is an estimate of the private property of the partners, which amounts to upwards of two millions of money: it has not realised half that amount. Do not talk to me of these things, or of the profits of the business, or of the business done, or of what it may have been calculated to be worth. It has all gone to ruin, and you must judge only by the results. Gentlemen, you must, in the first instance, correct the data on which the learned counsel asks you to proceed by the light of those circumstances, and of that evidence to which I have already directed your attention. But I have this further observation to make—it is not a question of what these things were actually worth, or what they have proved to be worth—the question is, what was honestly believed at that time to be the worth of this property, and to be the worth of this business. That is what we have to endeavour to arrive at; and to judge, as the learned counsel proposed to you, simply by the events which have taken place since, would be, I think, very likely to lead you to conclusions which a more careful and a more correct analysis would show to be unfounded and unjust. We are dealing with a question of fraud, and we must therefore see what was the real belief at the time these estimates were made and these transactions were effected. Now we know, imperfectly it is true, but still as a fact which has transpired in the progress of this case, that as between the old firm and those who were to come in as new directors, and who in fact were to be the representatives of the new shareholders, calculations of this kind were gone into. A paper has been found in the handwriting of Mr. John Henry Gurney covered with figures, which has been in the possession of the official liquidator. According to these figures the private property of the partners was estimated at 1,658,000*l.* The Lombard-street property was estimated at 40,000*l.*, making a total of 1,698,000*l.*—call it in round numbers 1,700,000*l.* Then there was a sum in the Norwich Bank, standing to the credit of the old firm, which they were equally to give up, amounting to 590,281*l.* You have, therefore, in round numbers a sum of 2,290,000*l.* Was that at the time a fictitious, fraudulent estimate? or was it an honest belief, although it might, to a certain extent, be influenced by the sanguine view that men

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always take of their own affairs and their own interests? Was that at the time an honest estimate? That these calculations were gone into between the old firm and the new comers is, I think, a matter upon which it is impossible to entertain a doubt. The great disadvantage under which we labour at the present moment is, that those who alone could tell us what actually passed, who alone could tell us what discussion took place, what calculations were made, what figures were gone into, cannot, from the course which has been pursued, open their mouths to give us evidence upon that which it is all important to us to know. And here I must say that while I do not for a moment question or impugn the motives of the prosecutor in this case, or of those who are assisting him, while I give them the fullest credit for being actuated by public motives, and by a sense of duty, they believing no doubt that a gigantic fraud has been practised upon them and the other shareholders who have entered into this enterprise, and that those who have thus defrauded them ought to be made responsible at the bar of a criminal court of justice, and that they are only doing their duty by bringing them there—while I give them full credit for such motives, and cannot concur in any observations that have been made to their disparagement, I must say that I think it most unfortunate that in this case the new directors have been mixed up in the same prosecution and indictment with the old. I know of no case which has produced so strong an impression on my mind in favour of what has long been my growing conviction, namely, that our system which commits the prosecution of offences against the public to a private prosecutor, a system which differs from that of every other European nation, is based upon a false principle. I cannot but think that a public prosecutor is necessary to the due and perfect administration of criminal justice. If there had been a public prosecutor here, I will undertake to say that he would not have put those three gentlemen on their trial. If called upon to prosecute the members of the old firm, he would no doubt have had recourse to them, he would have called upon these new directors to make their statements to him, and if, in those statements, he had found matter upon which, in his judgment, the prosecution should go on against the members of the old firm, he would either have availed himself of their evidence to support the prosecution or, at all events, he would have left them free, that those who were to be put upon their defence should have the opportunity of calling before the jury, who were to pass in judgment upon them, those witnesses who above all others, and perhaps alone of all others, could have thrown light upon this most important part of the case. But inasmuch as the course taken by the prosecution has, as we were truly told by the Solicitor-General, shut the mouths of these parties, and prevented the other defendants from having the advantage of their evidence, we are bound in common justice to consider the conduct of those three gentlemen who thus came into this common enterprise. Do you suppose that men of



business, men of fortune, men of commercial position, would join themselves to a company of this kind, in which they were to embark large sums, without going into some calculations to see how far the terms proposed to them by the old proprietors were such as they could, as reasonable men, with prudence entertain? Can you suppose that they took the number of shares which we know they did take, and make themselves liable for the large sums upon which they incurred liability, without having gone into this matter? Another striking fact is this. There came a time when they were called upon to answer for what was said to be a common delinquency. They were called upon to answer for a gigantic fraud in having induced the mass of shareholders to take their shares upon a representation that this was a sound company, or that, if under temporary embarrassment, in the end, at all events, it would come out all right and whole; they were charged with having made this representation fraudulently, and induced shareholders to pay down their perhaps hard-earned money for delusive, valueless shares. What would you have expected men under such circumstances to do? Why to have said, "Don't blame us; we were the victims of the same delusion, from the consequences of which you are now unfortunately suffering; we were taken in by the old firm; they told us that the assets would realise so much; they told us that their property was worth so much; it turns out that that is all a delusion; we were ourselves deceived and misled, and are victims like yourselves." But what do they say? They say as far as they can say it—they have said it elsewhere, and they say it here by the mouths of their counsel, "We do not complain of the members of the old firm; we believe that they acted in a spirit of fairness and honour towards us: we admit that they disclosed everything to us; we do not say that we did not know all that it was essential we should know; we may have acted foolishly; we may have acted improvidently; we may have involved others in a common loss, but we cannot throw any blame on the members of the old firm, because we cannot impugn either the honesty of their representations or of the project in which they invited us to embark." This being so, it is for you to say whether, upon the whole of this evidence to which I have called your attention, there is sufficient to satisfy you that this concern was, at the time this transfer took place, the worthless and valueless affair which the prosecution seeks to make out. So much then for that first and very important head. I pass on to the second, which is whether the defendants, if they represented this business as a sound and remunerative business, knew that it was otherwise. As to that, the facts which I have been bringing to your attention, the evidence to which I have directed your notice, seem to me to be immediately applicable, and will probably determine your view of the matter. As I have before said, it is not because the defendants may have taken a too sanguine view of their affairs, and of the prospects of this concern, that therefore they are to be visited with a criminal prosecution. You must be satisfied that

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they knew that this concern was worthless ; and that, knowing it, they passed it off upon the public, or upon such of the public as would take shares, as being of value. When I say that, I do not mean that it would be necessary that the thing should be absolutely valueless ; it would be sufficient if it were relatively so ; that is to say, though the shares might eventually prove worth something, yet they were in fact of a value altogether so disproportionate to the pretended value that no man in his senses, if he had known all the circumstances, would have taken a share ; and the defendants knowing this combined to induce people to take the shares, they must be taken to have intended to defraud. It is not because there may have been some remote prospect of success which would have given a partial value to the shares, that nevertheless if a cheat and fraud was contemplated it would be sufficient to say that the shares were of some value, if you think the value was altogether disproportionate to the price paid for them. Now, having thus dealt with the first two parts of the inquiry, and coming to the third, which is as to what the defendants represented to the public, I come to what may be called the overt acts of this conspiracy. Now, the first and foremost of these is the publishing the prospectus ; and, as I read to you just now, the prospectus is alleged to have been fraudulent in several particulars, namely, in the following : that it was “ not intended to call up more than 15*l.* per share ; ” that “ in the opinion of the directors the terms could not fail to be highly remunerative, ” that “ the business would be handed over on the 1st of August, the vendors guaranteeing the company against loss on the assets ; ” that John Henry Gurney, Henry Edmund Gurney, and Robert Birkbeck “ would retain a large pecuniary interest ; ” that “ copies of the memorandum and articles of association and deed of covenant could be inspected. ” Now, I think there are two or three heads here which we may very summarily dispose of. First, that it was not intended to call up more than 15*l.* per share. Your view of how far that was true or not, would, as it strikes me, materially depend upon whether you believed that there was the alleged conspiracy or not. If the parties believed that the undertaking was likely to be a successful one, then, inasmuch as the payment of 15*l.* a share would, after deducting the shares retained by the old firm, realise, as I have before pointed out, 1,250,000*l.*, the probability is that they did not intend to raise more than 15*l.* per share. If, on the other hand, you believe in the existence of the conspiracy, and that they intended to get all the money upon these shares, to the extent of 50*l.* a piece, and to apply them to their own purposes, then as this would form part and parcel of the conspiracy, the question is involved in the question of conspiracy. It strikes me, therefore, that this allegation is one upon which you need not further be detained. I next call your attention to the statement that the “ business would be handed over, the vendors guaranteeing the company against loss on the assets. ” There is

no doubt it was part of this bargain, according to the terms of the deeds, that the vendors did guarantee the company against loss on the assets. If it is meant to be contended that while they guaranteed, in point of law, the guarantee was worth nothing in point of fact, this, again, will depend on whether you think that, in guaranteeing the amount of the deficit from their private property, they really believed that this property would be worth the amount which they undertook to guarantee. Then comes the statement that "John Henry Gurney, Henry Edmund Gurney, and Robert Birkbeck would retain a large pecuniary interest." That may have been a mere flourish; I do not think there is much importance to be attached to it. But they did retain, in one sense, a large pecuniary interest, for they were to hold a large amount of shares, and the value of these shares depended entirely on the success of the concern. But there are two important points on this prospectus to which I anxiously invite your particular attention. In the first place, what was the effect of the whole of this prospectus, coupled with the articles of association, and with the deed referred to in this prospectus? Was it to produce an impression upon the mind of those who should read them, that the concern was substantially a sound one, in which men might embark their capital with fair and reasonable expectation of success? Whether the prospectus has that effect you must judge partly from its contents and partly from the general evidence in the case. I cannot help thinking that, looking at it as a whole, it certainly does bear the construction which the prosecutor seeks to put upon it. When it says that, looking to all the circumstances, and to the fact that a sum of 500,000*l.* is all that is to be paid for this business, there is every prospect of a large and remunerative return to the shareholders, it does certainly hold this out as a sound and going concern. It is to be observed, at the same time, that it does no more than this; and it is, perhaps, as succinct and jejune a prospectus as one as ever seen. It is a complete mistake to say that it makes any representation as to the assets of the company, so far as the four millions of bad or doubtful assets are concerned. And here I must say that I think the observations of the Solicitor-General as to what was said by the learned counsel for the prosecution in his final address to you were not without foundation, for you certainly were told, again and again, perhaps in the heat of discussion, that these debts had been represented as assets of the company. They are nowhere represented as anything of the kind; certainly not in the prospectus; certainly not in the deeds. On the contrary, the whole arrangement between the two parties, the old firm and the new directors, was based on the assumption that of these four millions only a limited proportion could be realised. I should say that there is a marked difference between this prospectus and almost every other prospectus that has formed the foundation of proceedings at law, whether civil or criminal, that we have heard of late

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years. Generally, you know, there is some positive misrepresentation, or some material concealment which vitiates the affirmative statements put forward. We have known of legal proceedings in consequence of assets being declared which did not exist, of liabilities being concealed which did, of anticipated returns which were altogether delusive and mere moonshine, of representations as to shares having been taken, which, in fact, had not been taken, or where the number taken fell greatly short of what was represented; where in short, in various forms, the expectations and facts which had been held out to persons to invite them to join bubble schemes and fictitious companies, have been positive misrepresentations or actual perversions of the fact; and in most of those, you will bear in mind, the proceedings were of a civil and not of a criminal character. Here we must be still more particular, to see that we do not import into this prospectus and the representations made by the directors to the proposed shareholders, anything beyond what the prospectus and the documents legitimately carry with them. At the same time, if looking at this prospectus, it is impossible to arrive at any other conclusion than that the directors intended to convey to the public that this was a concern in which, if shares should be taken, there was every probability of a remunerative return; and if you shall be of opinion, by and by, that this representation was intentionally delusive, the defendants will be answerable for that which they have stated, on the first counts, if the false representation was for the purpose of inducing persons to take shares, or on the counts for conspiracy, if this representation was in furtherance of the conspiracy for the purpose of defrauding them of their money. It is further said that there being in this prospectus a statement as to the affairs and state of the company, there is extrinsic evidence to show that this was all delusive. Several circumstances are referred to in which the learned counsel for the prosecution dwelt with considerable emphasis. It is urged as a proof of deliberate fraud that Mr. Gordon drew up a prospectus in terms so flowery and exaggerated that, even before it was submitted to the directors, somebody thought it necessary to modify many of the phrases contained in it; and that, after all, though so altered and modified, it could not be accepted by the directors; that they threw it on one side, and adopted the far more modest statement found in the prospectus, and that therefore there must have been fraud contemplated on the part of Mr. Gordon. Well, there are the two documents. But that, because the body of the directors thought it right to put forward only a moderate and temperate statement such as might appear to be consistent with propriety, because they qualified the expressions contained in Mr. Gordon's draft, and reduced them to the comparatively modest dimensions of the published prospectus, you should be asked to assume in the total absence of proof of any kind that fraud was intended, but that the directors, though pre-

pared to go to any lengths, were deterred by fear of the law, and influenced by the dread of exactly keeping within its limit so as to escape its penalties, does appear to me wholly unwarranted. I should have been disposed to draw, and you will probably draw, exactly the opposite inference. When you find a body of men sitting down to determine in what way a project and an undertaking they profess to offer to the public shall be described, and you find them cutting down exuberance of assertion or style, and reducing their statements into moderate and fair proportions, so far from believing that they have been actuated by a criminal and fraudulent spirit, on the contrary, you would probably draw exactly an opposite inference. We now come to the second ground upon which this prospectus is impugned, namely, that it contains a reference to one only of the two deeds by which the arrangement between the old firm and the new company was to be carried out. Undoubtedly, it is true that the prospectus does refer to one deed only, while I think it is equally true that, to enable any body to understand the exact nature of this undertaking, and the terms upon which the new comers were to be introduced into the concern, it was necessary that it should be known that there were two deeds. Now, how came this to pass? The solicitor has given evidence upon the subject, and you will weigh that evidence well, and judge for yourselves how far you can implicitly rely on it. He applied (he said) to an eminent conveyancer to prepare the necessary deed or deeds, and he thought it better there should be two deeds. Accordingly, the conveyancer prepared the drafts of two deeds, the one simply providing for the transfer of the business, with its assets and liabilities, to the new company, the other to fix and settle the terms of the arrangement upon which those accounts which the new company, or rather the directors of the new company, did not intend to take to—namely, these four millions of doubtful debts—should be realised, as far as it was possible, by the old firm for the benefit of the new. The conveyancer, having prepared the drafts of those two deeds, the solicitor says, that, in the course of his duty, he submitted them to the new directors, Mr. Gordon and Mr. Rennie, who said, however, that as they were in fact the representatives of those who should become shareholders, and might therefore have interests antagonistic to those of the members of the old firm, who were the sellers, they being the buyers, it would be more satisfactory that they, the buyers, should be represented by separate solicitors and separate counsel. In this, I think, every one will see that there was nothing which could excite surprise. On the contrary, every one will agree, I think, that Mr. Gordon and Mr. Rennie were perfectly right in what they did. The solicitors to the Oriental Bank, of which Mr. Gordon was chairman, employed their own conveyancing counsel, who, when he came to see the drafts of the deeds, he was not satisfied with them; he thought they were not sufficiently stringent or minute to secure the in-

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terests of the new company and the new shareholders : accordingly he made numerous alterations, which alterations had again to be submitted to the other counsel, who did not accede to many of them, and so the two conveyancing counsel had to meet from time to time, and see if they could get over the difficulties which one or the other suggested. By all this course of proceeding time was consumed. It had been arranged with the brokers that the prospectus should be issued on the 12th of July. The 11th arrived, and still no deed had been settled, and it was impossible to issue the prospectus without referring to the deed. Then on the 11th, after much discussion, the terms of the first deed were agreed to, and that deed was considered as finally settled and done with. Accordingly they were enabled, on the ensuing day, to issue the prospectus ; and as there was but one deed executed, and but one deed in existence, the prospectus refers to one deed only ; the second deed remained to be further considered. It was discussed again and again ; the counsel were unable to agree upon it. But it seems that by the 25th of July all difficulties had been overcome, and on that day the draft is returned as finally settled, with the assent of the two conveyancing counsel. On the 8th of August, or shortly before the 8th of August, application was made to the Stock Exchange by the brokers of the new company for a settlement. The Stock Exchange, answering through their secretary, say, "You must send us certain documents ; amongst others the deed by which the interests of the old firm is transferred to the new company." They had the prospectus before them, and of course in the prospectus they would see mention of one deed only ; in the documents sent to the Stock Exchange, as in the prospectus, one deed only is referred to ; so one deed only was asked for, and one deed only is sent. Now at that time—the 12th of August—which was the day on which the documents were sent to the Stock Exchange—it is an undoubted fact that two deeds existed. It is equally certain that only one deed was sent. The solicitor offers an explanation : he says, "Inasmuch as in the prospectus only one deed was referred to, and that was the essential deed which effected the transfer to the new company, I, acting upon my own judgment, sent only one deed to the Stock Exchange." But we have here to ask ourselves if the directors had anything to do with the not sending this draft to the Stock Exchange. We have, I think, two witnesses as to that. It appears that upon the secretary receiving the letter of the secretary of the Stock Exchange, he immediately submitted it to the next board meeting, and then there is a resolution of the 8th of August, "that the secretary do send to the Stock Exchange the particulars required, and that he apply to the solicitor for such particulars." That at least is the substance of it. Then says the secretary, "I did apply to the solicitor ; I had no instructions whatever from the directors to keep back any deed ; I had no instructions to apply to the solicitor for one deed rather than for two ; I simply acted in obedience



to the terms of the resolution, which directed me to ask the solicitor for such documents as would satisfy the requirements of the Stock Exchange: I did so; the solicitor gave me only one deed, and I therefore sent that one deed. But the directors had nothing to do with that." Then the solicitor goes on and says, "I acted therein upon my own judgment; I had no communication with the directors; I did not receive any instructions from them not to send the second deed; but, inasmuch as one deed only was referred to in the prospectus, I thought it was sufficient to send only one deed, namely, the first deed." Now I think it is quite impossible not to feel that this was an unfortunate proceeding, to say the least of it. The prospectus leads to the supposition that there is one deed only; but the true state of the transaction, the true nature and effect of the transaction, could not be known from the single deed. I cannot help thinking that the shareholders who were invited to join in this undertaking ought to have been told that there was a second deed; and that the Stock Exchange, who exercise a wholesome and salutary influence upon the formation of companies, by the power which they have of withholding settlements if they are not satisfied that all necessary preliminaries have been complied with, ought to have been told that there was a second deed. I cannot help here observing that the public should take warning by this not to trust too much to the exercise of this authority; for it is impossible, to any body conversant with these matters, to look at that first deed, and not see that something more is required in order to carry out what it finally contemplates as to take place between the parties. But the Stock Exchange pass it, and grant a settlement. I cannot but think that the shareholders ought in some way or other to have been apprised of what was the arrangement between the old firm and themselves; not that I believe, with regard to the great mass of the shareholders, that it would have made the slightest difference. It is all very well for men, when they find they have embarked in a ruinous enterprise, to turn round and say, "If you had only told me that there was a second deed, I should have gone and looked at it, and then I should have seen that there was not only a deficiency of assets, but that those assets were to remain unsatisfied for a period of three and a half years. If I had known that I should not have joined in the undertaking." It is all very well to say this after the event, and no doubt people persuade themselves of the fact; but when I find that in this undertaking, the prospectus of which states nothing of the position of the firm, neither whether its assets were equal to its liabilities, nor, if there was a deficiency, to what extent that deficiency went—no less than 200,000 shares were applied for; and that only thirty or forty people went to look at the deed referred to in the prospectus—I am very much inclined to think it is not to the deed or the terms of the transfer that people would have looked, in order to make up their minds whether they would take shares or not. They would have done as Mr. Peek, with

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perfect candour, tells us he would have done, "What," I asked Mr. Peek, "would you have done, if you had known that there was a second deed? Should you have insisted on seeing it before you took your shares?" "No," says Mr. Peek, "I do not think I should." I am quite sure he would not. The fact that the business to be transferred was that of Overend, Gurney, and Company, the fact that three or four gentlemen well known in the commercial world as men of wealth and standing were willing to embark large sums in this enterprise, and the reliance that was placed on the names of the Gurneys, would, no doubt, lead the unthinking multitude to embark their capital without any hesitation in a concern which everybody believed at that time would turn out profitable and advantageous. Still that is not conclusive, and the question arises, whether it was not important to anybody who did not go blindly as the multitude do, but who was disposed to take a sensible and sound view of all the circumstances before he joined the company, that he should have a full opportunity of knowing the precise state of things before he embarked his money? Was it wrong that that information should be withheld from him? That it practically was withheld there can be no doubt. There is nothing upon the face of this prospectus, there is nothing upon the face of the articles of association, there is nothing upon the face of the first deed, to tell the shareholders that there was a deficit to the large extent to which the deficit existed, (a) or to tell them that in respect of this deficit, or a considerable portion of it, they must trust to the private fortunes of the old proprietors of the firm. I dare say, if it had been all known, as I said just now, it would have made no difference. At the time, the Messrs. Gurney stood high in position in the commercial world. At all events it was known that they were men of large property, and if it had been said to anybody, "there may be a deficit eventually of one million, possibly of two millions, but then the Gurneys undertake to be responsible for the whole; they ask nothing at the present moment for the transfer of the business; you will get it for the price you pay for your shares without paying anything to them; the whole amount you pay will go into the funds of the new company, and will be available for the purposes of business, Will you join?"—judge for yourselves what would have been the conduct of the applicants for 200,000 shares. How many, do you think, if they had known the whole arrangement, would have hesitated to embark their capital, as they did in ignorance, in the enterprise? You must judge of that. At the same time, if you think that this was a contrivance for the purpose of concealment, that it was merely a mode of giving effect to the conspiracy, if conspiracy there was; that it was intended to keep the persons to whom it was proposed to take shares in the dark,

(a) But the prospectus did disclose that there was a deficiency, and the cases in equity show that where general information is given, it is for the party to make inquiry and ask for more particular information.

from a fear that if they had really known what the true circumstances were they would not have come forward and paid in their money; and that the intention of the whole thing—this concealment included as part of the means resorted to—was to cheat and defraud the shareholders of their money—then the necessary consequence must be that you must find some, if not all, of these defendants guilty. But, on the other hand, if you should take the view that those who committed this act of reticence in a matter in which they ought to have been outspoken, honestly believed that the enterprise was a sound one, but, perhaps, may have thought it was just as well not to tell the shareholders all the precise circumstances of the arrangement, because it might operate upon timid or cautious persons, and induce them to withhold their contribution as shareholders, when in point of fact, if they could be induced to join, the enterprise would turn out for the company's benefit and must in the end be beneficial,—then the fraudulent and criminal intent alleged to have been at the bottom of this conspiracy fails. Though it may have been wrong that there should be two deeds when only one was referred to—and when one no doubt would have sufficed if all the terms of the second deed had been, as they might have been, introduced into the first—although you may think that that was wrong and culpable, and that if the shareholders, upon coming to this knowledge, had insisted on having back their money they would have been entitled, either by action or by suit in equity, to recover it; or, that upon its being attempted to make them pay the further calls upon their shares they would have good ground for resisting, yet, as I have before pointed out, that is not conclusive of the present question. If there was an arrangement not in itself a dishonest one, not dishonest *in se*, not dishonest as between the old firm and the new directors who knew of its existence, not dishonest in any way as between the old firm and the new shareholders, if it had been made known to them, but you think it was unduly concealed, then according as you may think that it was concealed with or without the fraudulent intention of getting the money of the shareholders, and applying it to the purposes of the conspirators—according as you believe that they did or did not intend to get this money *per fas aut nefas*, and having got it, to divert it from its proper purpose, the common benefit, to the payment of their own debts, then you must find them guilty or not guilty. If you believe that, though there may be some impropriety, and something which would be fatal to them in a civil action, either brought by them as plaintiffs, or defended by them as defendants, yet there was no intention to cheat or defraud those who became shareholders, the result must be the acquittal of the defendants. I have thus drawn your attention to the first three out of the four questions which I told you were involved in this inquiry, namely, first, the state of the affairs of the old firm at the time of the transfer; secondly, if you should be of opinion that those affairs were

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desperate and the concern worthless, whether that was present to the mind of the defendants; thirdly, whether there was any misrepresentation or concealment by them of the true state of the affairs. We now come to the fourth head, which is, if there was any misrepresentation by the old firm and by the new directors, what was their intention in making it? because, as I have more than once pointed out, in this case intention is everything. A guilty mind—what we lawyers call the "*mens rea*"—is essential to constitute a crime in the eye of the law. Misrepresentation or concealment may, as I have told you, afford matter of civil action and remedy. But you must have more than that, you must have the guilty mind, to constitute the offence with which the defendants are charged. Now, no doubt every man must be taken, *primâ facie* at all events, to have intended what are the natural and necessary consequences of his acts; and if you find that there was misrepresentation, and that it has ended in defrauding the parties to whom it was addressed, the fair and legitimate inference is, that the intention was that the act done should carry with it the consequences that have followed from it. But this presumption may be rebutted by the other circumstances of the case; and where intention enters as largely into the consideration of the question of guilt or innocence as it does in a charge of conspiracy and fraud, it becomes most important to look to see what motives could have operated upon the mind of the party charged to induce him to commit the offence. It becomes, therefore, very material to see what could have been the possible motives which operated upon the minds of these defendants to induce them to commit the offence with which they now are charged. Now, there is an obvious distinction which has struck everybody from the beginning of the case—and the learned counsel for the prosecution not less than anybody else—between the classes of defendants who are before you to-day. With regard to the three defendants who joined the concern, Mr. Barclay, Mr. Gordon, and Mr. Rennie, as well as the fourth gentleman, Mr. Gibbs, who is no longer amongst us, it is obvious that if there was any fraud at the bottom of this affair they were as much sinned against as sinning, and just as much victims, to the extent to which they embarked their capital, as any of the other shareholders who have reason to complain, or who have instituted this prosecution. But you are asked, on the part of the prosecution, to believe that these four gentlemen, wholly unconnected in point of interest with the old firm, for the purpose I suppose of propping that old firm up and enabling it to go on, were induced to join in the new undertaking to which the old concern was to be transferred, at the sacrifice to two of them of no less than 50,000*l.*, to another of 25,000*l.*, and to another of 10,000*l.*, not only embarked in what they not only knew to be a fraudulent scheme for swindling the public, but which they also knew must speedily end in ruin. It is but reasonable to ask, what motive they had? Can you see any? Can you believe that these parties knew that

this fraud was contemplated, and were willing to become parties to it, not to gain anything, but with the certainty of thereby losing and sacrificing not only the money which they brought in, but that which to most men is more important than money, namely, honour, reputation, and character. To be sure it is said two of those gentlemen were to be directors, and get 500*l.* a year. What was the value of that? If the hypothesis of the prosecution is true, that the business was essentially rotten and valueless, and must come to an end at the expiration of a short time, what would then be the value of this 500*l.* a year, which after all, as has been pointed out to you, was only to endure until the first meeting of the shareholders, who might at once put these directors aside, and, at all events, could only endure for a limited period, at the expiration of which the directors in their turn would have to go out of the direction. Then there is the fact, and certainly not an unimportant fact, that these four directors, two of them with such very large stakes, kept their shares to the very last, and have thus lost every farthing they have had to pay upon their shares up to the present time—two of them 40,000*l.*, another 15,000*l.* or 20,000*l.*, I forget which, and another 8000*l.* Is that compatible with the notion of these men having been aware of the rottenness of this concern and of the certainty of its downfall? If, as has so often proved the case in bubble companies and delusive fraudulent schemes, you had found the men who originated this company getting rid of their interest, or taking measures and resorting to contrivances for what is called rigging the market and sending up the shares, and then parting with their own shares and getting out of the concern—if you saw anything of that course of proceeding in this particular case, it would be cogent to lead you to the conclusion that there had been fraud at the bottom of it. But just as such a fact would fairly lead you to such an inference, so the absence of such a fact ought to lead to the opposite conclusion. If you see that these men, each of them, endangered a very large sum of money, and what is equally important to a man standing high in the commercial world, imperilled his reputation and his honour, that there was nothing that they could gain by it worthy of a moment's consideration, that they might have got out of all difficulty by getting rid of their shares, or at all events of the shares in excess of what was necessary to qualify them as directors; that they did not take that course, and that one of them at a time when it was possible, if this company had been the bubble company which is represented, which might at any moment have come to grief, had, in addition to his 1000 shares, 90,000*l.* of money for two months in the till of this company—looking at all these facts, and to what are the motives that usually actuate human conduct, can you come to the conclusion that these men intentionally entered into a scheme based in fraud, and intended to carry out a most fraudulent and nefarious purpose? and who, upon the hypothesis of the prosecution, must have entered into it with a conviction

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that it would soon, from its inherent worthlessness, come to nothing, and who must thus be supposed to have voluntarily sacrificed all the money they put into it, with the nearly certain consequence of damaging their own reputations whenever its downfall should happen. If you cannot come to that conclusion, having regard to the motives which usually influence human conduct, ought you to hesitate about acquitting at least these three defendants? So much for those gentlemen. Now then as regards the other three, who, no doubt, stand in a different position. What motive had Messrs. Henry Edmund Gurney and Mr. Birkbeck, the other two defendants, and Mr. John Henry Gurney, who was not immediately a member of this firm otherwise than as a member of the Norwich firm, who had a certain share in this house, but was not an active managing partner in it—what motive had these gentlemen? You must give that question a fair and dispassionate consideration. Observe, that they gave up all their interest in the concern except that which was attached to the shares allotted to them as part of the purchase money. They gave up the whole sum standing in the private ledger to their separate accounts; they gave up all claims upon the house in every respect; they pledged the whole of their fortunes, real estates, and personal estates to satisfy the deficit which would still remain in the books of the company as against the old firm. Nay, more, they were to have 500,000*l.* as the price of the business, and they practically gave that up; they were not to get a single shilling paid down. 250,000*l.*, as I have already pointed out to you, was to be written off against their guarantee. They only got, therefore, the prospective benefit of the 250,000*l.*, to be taken in shares, which, but for the terms of the bargain, they might have taken into the market and sold, but which were not to be dealt with as theirs except for the benefit of the new company. These shares were to be hypothecated, and in the event of their private property not being sufficient to cover the guarantee which they had given that the assets should be equal to their nominal amount, these shares were to go to meet the deficit which might remain. They had no immediate benefit; none except what was contingent upon the success of the company, in which case their shares, if their private fortunes were sufficient to meet the demand upon them which their covenants had created, might be of value to them, but which, if the company failed, of course would be utterly worthless. But, then, to be sure Mr. Henry Edmund Gurney and Mr. Robert Birkbeck were to get 5000*l.* a year as managing directors, the one for five years, the other for three, at the end of which time it would be entirely at the discretion of the shareholders whether they would continue in the office of managing directors or not. That may have been some motive; but observe that it is no motive at all, if the hypothesis of the prosecution be a true one, because here again, if the new company was such as has been represented it necessarily follows that, if it was certain that the company must come



to a stand-still and break down, and then, of course, there would be an end of the 5000*l.* a year. But then it is said, and I think there is some force in the observation, that the Gurneys were already insolvent, and that if this new company had not been created they must have stopped and would have been bankrupt, in which case all their private estates and personal property would necessarily have gone to meet the demands of their creditors. That is quite true. Therefore, it is said, they gained this advantage, that they put off the evil day by interposing the new company between them and their difficulties, and got three and a half years, during which to turn themselves about and see what they could do to meet the liabilities which they had incurred. They got that advantage, which, to men embarrassed and in difficulty, is always of some value, namely, the chances which arise from what has been not inaptly termed the chapter of accidents. Well, there is something in all that; but here again the whole advantage which is thus alleged to have been derived by them from this arrangement is based upon the hypothesis that the company would go on. But what becomes of it if you say that the company was rotten and bankrupt, and must necessarily come to a standstill? The moment the company fell the Gurneys would necessarily be involved in the general ruin. If the company was such that their inducing persons to take shares could not possibly arrest or delay, beyond a very limited time, the utter ruin and the eventual catastrophe which must ensue, what good would they get by putting off the evil day for the few months during which a mere bubble company could possibly continue its existence? You must take all these circumstances into account. If you are of opinion that there was at the bottom of the transaction this evil and wicked motive, and that for the sake of delaying their own downfall, which they knew must sooner or later happen, they invited persons to come into the business in its new form of a limited company as shareholders, and to pay the price of their shares, when they knew that, necessarily, from the nature of things and the state of its affairs, the company could not go on, and that every man who paid his 15*l.* would as surely lose that 15*l.* as the sun rises the next day in the east when it sets at night in the west—if they knew and foresaw all that, and despite of that, with a view to their own private advantage, induced the public to come and take shares and pay a price on them, then they are guilty on this indictment. But if you think they entertained an honest, although possibly a mistaken, belief, in common with the other directors who were induced under the influence of that common belief to join them, that the Company would in the end succeed, that its difficulties were only temporary and would be overcome, that its powers of earning and making profits remained the same, and that all that was necessary to get rid of that portion of its affairs which had been a source of embarrassment and difficulty, and to infuse new blood into it and give it new vitality and life—if that is what they believed, then, though you may think they

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were rash in such expectations and that those who joined them in that belief were improvident and foolish, that is not sufficient to warrant a conviction, on a charge which involves an intention to defraud. You must be satisfied that there was the intention imputed to the defendants by this charge. The question for you is, whether they did intend deliberately, with a belief in the worthlessness of this concern, to delude and defraud those who might pay their money in order to become members of the company. Now, gentlemen, we have gone through these four, to my mind, essential questions, and you will have first to say what was in your judgment the state of this company; or rather (for that is the true form in which the question presents itself), what was the impression upon the mind of those who proceeded to the formation of this company; what was the state of their belief as to its condition and probabilities of its success? I have drawn your attention to the figures upon which it appears to me that this question depends, to the amount of the deficit, to the sums by which that deficit might be reduced, and the figure at which it would eventually stand. I have not troubled you by taking you through all the details of figures with which we were so much occupied during several consecutive days: the task would have been a hopeless one, if I had attempted it. But I do not think that it matters at all, because it has seemed to me from the beginning that, in order to ascertain the true position of this company, it is not necessary to go into all these wearisome details of accounts and arithmetic. There are certain salient points, there are certain leading features about the case which I think, if you properly take them into account, will enable you to find a footing and enable you to come to a conclusion that shall be satisfactory. As I have said, the first question is, what was the earning power of this firm? What were the profits which that earning power ought to bring forth? Was that earning power continued to the last? If continued to the last, how was it that profits were not realised as in previous times? Is there any circumstance to account for it? Upon the whole, are you of opinion that the business, if relieved from the dead weight and pressure which this accumulation of bad debts and of capital absorbed in these vain speculations had brought upon it, was a business which it was worth the while of a merchant or a company of merchants to purchase? I have pointed out to you what the deficit was. I have pointed out to you what were the sums by which that deficit was to be reduced, in the first place, by the assets which it was expected would be realised, in the second by the value of the guarantee and property of the members of the old firm. In the course of the observations I made to you this morning, I stated that it appeared to me, that from the value of 2,200,000*l.*, which, according to the calculation in the estimate, was the value put upon that property, there ought to be deducted a million by reason of outstanding guarantees, which were stated to amount

to somewhere about a million in round numbers, and which, although not actual and existing liabilities, were still contingent liabilities for which the private property of the partners would be liable. My attention has been very properly called, however, to the fact that of these contingent liabilities, according to the evidence of Mr. Harding, a great many have never matured, having been satisfied by other parties or by securities that were held; and to such extent as you may think that those guarantees ought not to operate to reduce the sum which might be expected to be realised upon the estates of the partners, to that extent there is a still further, or there may have been expected to be a still further sum capable of being applied to the reduction of the liabilities which the new company agreed to take upon themselves. In that case the supposed deficit of a million at which I had arrived would not exist, and there would be a sum equal to the total amount of the property to be taken into account in the course of the time allowed to the old firm to realise the whole property, and thereby to liquidate the amount which they had guaranteed to the new company. You must take all these circumstances into your consideration, and the question for you to determine upon it is whether this was a worthless property as has been described, or whether it was not; or rather—for again this is the true question—whether it appears to you or not, that whatever was the amount likely to be realised, or certain to be realised in the future, there was a reasonable and honest belief—or rather, I should say, an honest belief—for the reasonableness of belief, though it may be one element of judging of its honesty, is not conclusive—there was an honest belief on the part of the persons who entered into this engagement, upon the basis of which the new company was formed, that this was an enterprise in which, though the ship was stranded for the moment, she would be got off, and being relieved from the lumber of dead weight which had oppressed her, would again float upon the sea of commercial prosperity and success. If these parties did entertain that honest belief, though it may have since turned out to be fallacious, can it be reasonably contended that they can have contemplated the fraud which is ascribed to them by the prosecutor. The first question then is, what was the true state of this business? The second, as I have said, is, what was the state of mind on the part of the defendants at the time of this transaction? As to this, you are entitled, I think, to take into consideration what must have passed between the old directors and the new. You may see a little by that light. It seems impossible to suppose that the new directors did not make themselves acquainted with all the circumstances; and if you are satisfied that these new directors could have had no sinister motive, could have acted only on a sense of what was due to their own interests and the interests of the shareholders they were about to invite to join in the same enterprise and to sail in the same boat, you may judge of the belief or motives of the one set

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of these parties by what you cannot fail to believe was the true state of mind of the others. Then as regards any misrepresentations which have been alleged to be made, as to which you may think the prospectus went too far, or as to which it may have been deficient in not revealing that which it was essential for the shareholders to know, you have to judge of the guilt or innocence of these parties by the motives by which you believe them to have been animated. If you cannot see your way to the conclusion that they intended by false statements to induce persons to take shares, or that they combined to defraud and deceive and cheat future shareholders, though you may think they were unduly sanguine, though you may think they have not been as explicit in their statements as they ought to have been, that they have not, in that respect, acted with all the perfect openness and straightforwardness with which they should have conducted an operation of this kind and the formation of a new company based upon it, yet here again the same question presents itself—What was the purpose? Was it to induce persons to join with them in a common enterprise, which they believed would be for the benefit of all? or was it for the purpose of inducing them to embark their capital in an enterprise which they knew must end fatally, but which they desired to foster and create for their own fraudulent and evil purposes? These are the questions which you have to determine, and in judging of the latter question, as I have already said, motive is everything. You must look to see what was the position of the parties; what they would gain and what they would lose; what there is which should induce you to think that they were led by sinister and criminal motives to embark in a gigantic enterprise of fraud, which was to bring desolation and misery upon the homes of hundreds—nay, perhaps of thousands. You have been told that your verdict is to effect great things—that the commercial world requires to be purified and regenerated, and that your verdict is to effect this important end. Do not be influenced by any such consideration. Independently of your verdict, it may be hoped that the memorable event of the downfall of this company and the presence at the bar of a criminal court of justice of men who once stood so high, will not be without its salutary and beneficial effects. We have been told that the commercial world is not animated by the lofty principles and the safe rules of conduct which used to influence its dealings; that for the safe and sound principles upon which our fathers established the great commerce of this empire, and made the name of the British merchant respected to the uttermost ends of the world, there has been substituted a spirit of reckless speculation and of commercial gambling; and that the name of the British merchant does not stand as high as it once did in the estimation of the world. If this be so, I trust that this memorable example will not be without its warning upon those who are growing up around us. Here we have an establishment doing a business almost

unequalled, with the names of those who belonged to it known throughout the world as men of vast wealth, and of the highest commercial position. We have seen them "fallen from their high estate"; and through what? Through turning from the straight, legitimate path of that commercial department to which they belonged, and going astray after vain and delusive phantoms, and embarking the capital, which should have been devoted to their own particular business, to wild speculations and rash enterprises. We have seen them fall into absolute ruin, their commercial position destroyed, their vast fortunes scattered to the winds, and their reputations impaired and tarnished. Last, we have seen them at the bar of this court, as defendants on a charge of conspiracy and fraud. But I hope it is not only on the commercial world the lesson, if necessary, will not be lost; I trust it may not be without its influence upon the rest of society. There can be no doubt—no one who looks on what is passing around him can fail to see—that a spirit of speculation and gambling has taken possession of the minds of large masses of this community. Men who were wont to be satisfied with moderate gains and safe investments, seem now to be led away by a spirit of greed and gain, and are ready to embark their fortunes, however hardly earned, the results, perhaps, of a life of thrift and toil, in the too often vain hope and expectation of realising something by premiums upon shares, or making more than the ordinary and safe gains of capital. We see this every day. If this example should teach those who are ready to follow the *ignes fatui* of such vain delusions, that you cannot gain extraordinary profits without extraordinary risk; that it is unsafe to trust to names, whatever those names may be, in enterprises of which you cannot comprehend the scope or the details, and in the management and superintendence of which it is impossible that you should have any part or parcel, and that, by so doing, though you may possibly gain something in some of these enterprises, in others you may find yourselves irretrievably lost and ruined, it will not be without its use. If the case shall have any salutary effect in checking the disposition to speculation and gambling which seems to pervade all classes, which has led to high and illustrious names being soiled and tarnished, and to men who ought to have set an example to the rest of the world being compromised in doubtful and disreputable transactions, so much the better. I should rejoice if such should be the result, but that is altogether beside the question you have to determine. The question upon which your decision turns is simply whether, if you think this business was worthless—that is, worthless with reference to the price to be paid for the shares—you believe that these gentlemen who are defendants upon the present occasion knew that it was so. If you do not think it was worthless, the whole case falls to the ground; but if you think it was worthless, did they believe it to be such? and, believing it to be such, did they, for the purposes of fraud, endeavour to transfer it to shareholders who

REG.  
v.  
GURNEY.  
—  
1869.  
—  
Fraud—  
Conspiracy—  
Practice.



Roe.  
v.  
Gurney.

1869.

Fraud—  
Conspiracy—  
Practice.

should take it off their hands? If they did, they are guilty of this charge. If you cannot see your way to that conclusion—if the prosecution has failed to establish it—if looking at all the circumstances, though you may think there are parts of this transaction which are open to animadversion and blame, that the charge of intentional fraud fails, I am sure you will have satisfaction in being able to acquit them, so that to the (I had almost said) degradation—certainly, commercially speaking, the degradation—and looking at their present position as defendants at the bar of this court on a charge of conspiracy and fraud, the social degradation—to which unfortunately they have fallen—shall not be superadded the painful consequence which must necessarily follow from a verdict of guilty. At the same time, if you are of opinion, upon the whole of the evidence, that the case is made out, no considerations of compassion or pity ought to stand between you and the verdict which, upon your consciences, it would then be your duty to pronounce.

*Not guilty.*

*Kenealy* asked his Lordship to make an order allowing the costs of the prosecutors, under the 24 & 25 Vict. c. 96, s. 121—“The court before which any indictable misdemeanor against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony,” &c. He asked his Lordship to certify that this was a fit case to be prosecuted.

COCKBURN, C.J.—If you had confined the prosecution to the three original members of the old firm who are defendants, although I entirely concur, unhesitatingly concur, in the propriety of the verdict which the jury have returned, yet, believing that it was a case for inquiry as to them, and believing also that Dr. Thom was actuated only by perfectly honest motives in instituting these proceedings, I should not have hesitated to allow the costs; but inasmuch as, in my judgment and opinion, the uniting the other defendants in the same indictment, and proceeding against them in the same prosecution, was altogether an unjustifiable measure, I cannot allow the costs. I must say that in the whole course of my experience I never met with a prosecution which, as regards those three defendants, I think was less warranted—at all events, they certainly ought not to have been included in the same indictment with the others, whereby those others were entirely precluded from calling them as witnesses. Under these circumstances, I think the prosecution has not been conducted as it ought to have been conducted, and therefore that I ought not to make any order.



## COURT OF CRIMINAL APPEAL.

*January 22, 1870.*

(Before COCKBURN, C.J., BYLES, J., and KEATING, J., PIGOTT, B.,  
and CLEASBY, B.)

REG. v. HAPGOOD AND WYATT.(a)

*Rape—Attempt to commit—Aiding and abetting.*

*H. was indicted for rape, and W. for aiding and abetting; both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt: Held, that W. was properly convicted.*

CASE reserved by Pigott, B., for the opinion of the Court for the Consideration of Crown Cases Reserved.

The prisoners were tried before me at the last Winter Assize at Taunton, upon an indictment which charged the prisoner Hapgood with rape, and the prisoner Wyatt with aiding and abetting in the above rape.

The jury acquitted both prisoners of the felonies charged, but found them both guilty of misdemeanor, Hapgood of attempting to commit the rape, and Aaron Wyatt of aiding Hapgood in the attempt.

The prisoner Wyatt's counsel submitted that this finding amounted to an acquittal of Wyatt altogether, inasmuch as the case was not within the stat. 14 & 15 Vict. c. 100, s. 9.(b)

I overruled the objection and passed sentence upon him; but, at the request of the defendant Wyatt's counsel, I reserved the point for this Court.

The question is whether Wyatt was properly convicted of misdemeanor.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) That statute enables a jury to find a person guilty of an attempt to commit the offence, on an indictment for felony or misdemeanor, if it appears that the person charged did not complete the offence, but was guilty only of an attempt to commit the same.

REG.  
v.  
HARGOOD.

1870.

Rape—  
Attempt—  
Aiding.

If the Court think he was not, then the verdict and judgment against him are to be vacated, and a verdict of not guilty is to be entered.

G. PIGOTT.

No counsel appeared on either side.

COCKBURN, C.J.—The Court is of opinion that the conviction was right.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 22, 1870.*

(Before COCKBURN, C.J., BYLES, J., KEATING, J., PIGOTT, B., and  
CLEASBY, B.)

REG. v. FRENCH. (a)

*Forgery—Acquittance—Receipt—24 & 25 Vict. c. 98, s. 23.*

*A document, called a "clearance," issued to members of the Ancient Order of Foresters Friendly Society, certified that the member had paid all his dues and demands, and authorised any court of the order to accept the bearer as a clearance member :*

*Held, that this was not the subject of forgery within the 24 & 25 Vict. c. 98, s. 23, (b) as an acquittance or receipt.*

CASE reserved for the opinion of this Court by Lush, J., at the last Summer Assizes for the West Riding of Yorkshire, held at Leeds.

Indictment on the 24 & 25 Vict. c. 98, s. 23, for forging an acquittance or receipt for money.

The prisoner was secretary of a friendly society called the Ancient Order of Foresters, which had branches in various towns. A member removing from one place to another, who had paid all dues, was entitled to a document in the form hereafter set out,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The 24 & 25 Vict. c. 98, s. 23, enacts " Whosoever shall forge or alter, offer, &c., any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement or assignment of any such accountable receipt, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, &c.

called a "clearance," which admitted him to all the privileges of membership at any place where a branch of the society existed.

The qualifications for membership were the payment of an entrance fee, a certain time of probation, and certain general payments made at meetings of the society called "courts." At these courts, constituted by the presence of the chief ranger, the sub-chief ranger, the treasurer, the secretary, and two members at the least, the payments were made to the secretary, and by him handed over there and then to the treasurer. Neither the chief ranger nor the sub-chief ranger received or was responsible for any of these payments, nor were their signatures to a "clearance" understood as importing that any money had been received by them or either of them; but a "clearance" without their signatures would not have been accepted.

Edward Cragg, a member of the society, was entitled to a "clearance," but the money he had paid had not been accounted for by the prisoner to the treasurer.

The prisoner sent to Cragg a "clearance," of which the following is a copy, and to which he forged the names of the chief and the sub-chief rangers:—

*"Ancient Order of Foresters Friendly Society.*

*"Member's Clearance.*

*"Authorised form pursuant to General Law.*

*"SAMUEL SHAWCROSS, Permt. Sec.*

"Court 'Painters,' No. 4076 of the Leeds District, held at the Harewood Arms, Harewood-street, in Leeds, in the county of York.

"To all whom it may concern. These are to certify that the bearer hereof, brother Edward Cragg, a married man, now aged twenty-six years, by trade a painter, was admitted a member of the above court on the 25th day of June, 1864, and has paid all dues and demands up to the 29th day of August, 1868.

"We therefore hereby authorise any court of the order to accept the said brother as a clearance member, subject to the conditions expressed in the general laws, to which, so far as they may apply to the above court, we undertake to conform.

"In witness whereof we have, by order of the court and on its behalf, subscribed our hands, and affixed the seal of the court.

(Seal.)

"THOMAS MAW, Chief Ranger.

"JOHN DOYLE, Sub-Chief Ranger.

"GEORGE FRENCH, Secretary.

"CAUTION.—The member to whom this clearance is granted, must throw it into some legal court within two calendar months from the time of drawing the same, and should it be refused by any court, it must be returned to the court which granted it, within one calendar month, or the member will become suspended: (See General Laws, 92, 93, 94, 95.)

REG.  
v.  
FRENCH.  
—  
1870.  
—  
Forgery—  
Acquittance.

REG.  
v.  
FRENCH.  
—  
1870.  
—  
*Forgery—  
Acquittance.*

“We, the undersigned, declare that this is the document presented to this court, No. 1567, by brother Cragg, on Oct. 26, 1868.

(Seal)

“WILLIAM TRANTER, C.R.

“NATHANIEL POWELL, S.C.R.

“THOMAS BATES, Secretary, Court 1567.

“May 24, 1864.”

The question for the opinion of the Court is, whether the above document is an acquittance or receipt for money within the meaning of the statute.

The prisoner was convicted, but admitted to bail.

ROBERT LUSH.

No counsel were intructed on either side.

COCKBURN, C.J.—In this case it appears that there was a doubt whether the document the prisoner was indicted for forging was an acquittance or receipt for money within the statute 24 & 25 Vict. c. 98, s. 23, upon which the indictment was framed. We are of opinion that it was not an acquittance or receipt for money within that enactment, and that it is nothing more than what it purports to be, viz., a certificate certifying that the bearer was admitted a member of the court which issued it, and had paid up all dues, and authorising any other court of the Ancient Order of Foresters to accept the bearer as a clearance member. We think that it is simply a certificate, and not in any sense of the term an acquittance or receipt for money within the meaning of the statute, and therefore that the conviction cannot be upheld.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

January 22, 1870.

(Before COCKBURN, C.J., BOVILL, C.J., KELLY, C.B., MARTIN, B., WILLES, J., CHANNELL, B., BYLES, J., KEATING, J., BLACKBURN, J., PIGOTT, B., MELLOR, J., LUSH, J., HANNEN, J., BRETT, J., and CLEASBY, B.)

REG. v. MARTHA FALKINGHAM AND MARY FALKINGHAM. (a)

*Abandonment or exposure of child—24 & 25 Vict. c. 100, s. 27.*

*The mother (one of the prisoners) told the putative father before the birth of an illegitimate child that she would father it on him and he would have to pay for it. He said, "I will not pay for it, but if you send it to me I will keep it." About five weeks after its birth the prisoners put the child into a hamper carefully wrapped up, and left it at a railway station, and paid the fare. The hamper was addressed, and the words "with care, to be delivered immediately," added. The transit and delivery occupied about an hour. When the hamper was opened the child was alive. It was taken to the workhouse and lived for three weeks afterwards, when it died from causes not attributable to the conduct of the prisoners :*

*Held, by a majority of the judges, that this was a case of abandonment and exposure of a child within the 24 & 25 Vict. c. 100, s. 27.*

CASE reserved for the opinion of this Court.

The prisoners were indicted at the Michaelmas Quarter Sessions of the North Riding of Yorkshire for a misdemeanor under the 24 & 25 Vict. c. 100, s. 27.

The following is a copy of the indictment :

The jurors for our Lady the Queen upon their oath present that Martha Falkingham and Mary Falkingham, on the 25th of August, 1869, unlawfully and wilfully did abandon and expose a certain child then being under the age of two years, whereby the life of the said child was endangered.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

REG.  
v.  
FALKINGHAM.

1870.

*Abandonment  
of a child—  
Evidence.*

The prisoner, Mary Falkingham, was the mother of the child, which was about five weeks old at the time mentioned in the indictment, at which time both prisoners were residing together at Stockton-on-Tees.

It was proved that the prisoner Mary Falkingham, about four months previous to the birth of the child, had an interview with the father of the child, who was then residing at Guisborough in this Riding, at which interview they had a conversation relative to the maintenance of the child after it should be born. She told him that she should father the child on him, and that he would have to pay for it, to which the man replied, "I will not pay for it, but if you send it to me I will keep it." Nothing was said by either of them as to the time at which or the mode by which the child was to be sent.

On the day named in the indictment, both prisoners put the child into a hamper wrapped up in a woollen shawl, and packed with shavings and cotton wool, and the prisoner Mary Falkingham, with the knowledge and connivance of the other prisoner, took the hamper by a passenger vessel on the river Tees from Stockton, where they resided, to Middlesbrough (a distance of about four or five miles), at which latter place she took the hamper to the booking office of the railway station, and there left it, paying sixpence for the carriage thereof, and telling the clerk to be very careful of it, and to send it to Guisborough by the next train, which would leave Middlesbrough in ten minutes from that time. She did not say anything as to the contents of the hamper. The hamper was addressed "Mr. Carr's, Northoutgate, Guisborough, with care to be delivered immediately," at which address the father of the child was then lodging.

The hamper was carried by the ordinary passenger train from Middlesbrough to Guisborough, leaving the former place at 7.45 p.m., and arriving at Guisborough at 8.15 p.m. At 8.40 p.m., it was delivered by a railway porter at its address.

On its being opened, it was found to contain the child alive, and packed in the manner before mentioned, with a paper on which was written, "Please take care of this child, for George Beaumont is the father of it."

The child was taken by the relieving officer the same evening to the union workhouse, where it lived for three weeks afterwards, at the expiration of which period it died from causes not attributable to the conduct of the prisoners or either of them. It was proved to have been a delicate child.

The prisoners' counsel objected that upon these facts there was no evidence to go to the jury that the life of the child was endangered; and, secondly, that there was no abandonment, and no exposure of the child within the meaning of the statute.

The Court overruled the objections, and left the case to the jury, who found both prisoners guilty.

At the request of the prisoners' counsel this case was granted



by the Court for the opinion of the Court of Criminal Appeal whether the prisoners were rightly convicted.

Both prisoners were admitted to bail to appear at the next Court of Quarter Sessions for the North Riding of Yorkshire, to receive judgment if called upon.

JOHN R. W. HILDYARD,  
Chairman.

REG.  
v.  
FALKINGHAM.  
—  
1870.  
—

*Abandonment  
of a child—  
Evidence.*

No counsel appeared for the prisoners.

*Shepherd* was instructed to argue on behalf of the prosecution, but was not called upon.

The 24 & 25 Vict. c. 100, s. 27, enacts that whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

COCKBURN, C.J.—This was an indictment and conviction of the prisoners for abandoning and exposing an infant child, and having been informed that the case was not to be argued on the part of the prisoners, the Judges have considered the point reserved before coming into Court, and as the majority of the Judges are of opinion that the conviction should be affirmed, it will be unnecessary to hear the learned counsel in support of it. At the same time all the Judges are of opinion, looking to the peculiar circumstances of the case, and to the fact that this is the first case of the kind that has arisen under the statute, and to the possibility that the prisoners were not aware that they were committing an offence, that a lenient sentence will meet the exigencies of the case.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

January 22, 1870.

(Before COCKBURN, C.J., BYLES, J., KEATING, J., PIGOTT, B., and  
CLEASBY, B.)

REG. v. WILLIAM PARKER.(a)

*Depositions—Magistrate's signature—Pleading—Surplusage.*

*It is sufficient if the signature of a committing magistrate be attached, in the form in schedule M. of 11 & 12 Vict. c. 42, at the conclusion of the depositions of the several witnesses, and his signature need not be subscribed to the deposition of each witness respectively.*

*An indictment for making a false declaration before a justice of the peace as to the loss of a pawnbroker's ticket concluded, "Whereas, in truth, the defendant had not lost the said ticket, but had sold, lent, or deposited it as a security to one J. O.:"*

*Held, that the allegation, "that the defendant had sold, lent, or deposited it as a security to J. O." might be rejected as mere surplusage, and did not vitiate the indictment for uncertainty.*

CASE reserved by Mr. Justice Lush for the opinion of this Court.

The indictment was in the following form :

Northumberland, } The jurors for our Lady the Queen on their  
to wit. } oath present, that William Parker did,  
on the 6th April, 1869, at the parish of Tynemouth, in the  
borough of Tynemouth, in the county of Northumberland,  
wilfully and corruptly make a false declaration before John  
Byrom Bramwell, Esq., one of Her Majesty's justices of the peace  
for the said borough of Tynemouth, that he, the said William  
Parker, had lost a certain note or memorandum, being a pawn-  
broker's ticket.(b) Whereas in truth and in fact he had not lost  
the said ticket, but had sold, lent, or deposited it as a security to  
one James Carter, as he, the said William Parker, well knew at

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) 39 & 40 Geo. 3, c. 99, s. 16; 5 & 6 Will. 4, c. 62, s. 12.

the time he made the said false declaration against the form of the statute in such case made and provided.

The deposition of a deceased witness was tendered and objected to on the ground that it did not purport to be signed by the justices before whom it purported to have been taken as required by the 11 & 12 Vict. c. 42, s. 17.(a)

The deposition in question was the second of four depositions made at the same hearing, all of which were pinned together. Each occupied more than one sheet of paper.

The justices did not sign either of the sheets on which the depositions were written except the last (that sheet not containing any part of the deposition in question), and the signature was appended at the end of the last deposition to a statement in the following form copied from schedule M. of the 11 & 12 Vict. c. 42. "The above depositions of" (naming the several witnesses, and amongst them the deceased,) "were taken and sworn before us at, &c., according to the form in the schedule."

I allowed the deposition to be read subject to the opinion of this Court on its admissibility.

(a) The 11 & 12 Vict. c. 42, s. 17, enacts, that in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily after summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and the justice or justices before whom any such witnesses shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justices purporting to sign the same.

#### SCHEDULE M.

— } The examination of C. D., of , farmer, and E. F., of ,  
to wit. } labourer, taken on [oath] this day of , in the year of  
our Lord , at , in the county aforesaid, before the undersigned [one]  
of Her Majesty's justices of the peace for the said [county], in the presence and  
hearing of A. B., who is charged this day before [me], for that he, the said A. B.,  
on , at [&c., describing the offence as in a warrant of commitment].

This deponent, C. D., on his [oath] saith as follows, &c. [stating the deposition of the witness as nearly as possible in his own words. When his deposition is complete, let him sign it.]

And this deponent E. F. upon his oath says as follows [&c.]

The above depositions of C. D. and E. F. were taken [sworn] before me, at ,  
on the day and year first above mentioned.

J. S.

REG.  
v.  
PARKER.  
—  
1870.  
—  
Practice—  
Depositions.

REG.  
v.  
PARKER.  
—  
1870.  
—  
Practice—  
Depositions.

It was objected, after the jury were sworn and charged, that the indictment was bad for uncertainty, as it alleged in the alternative that the prisoner "had sold, lent, or deposited it."

I overruled the objection, but as I meant to reserve the other point, I also reserved this for the opinion of the Court: (See 1 C. & K. 243.)

The prisoner was convicted, but not sentenced. I admitted him to bail, but I am not aware whether he has been able to find it or not.

If the deposition ought not to have been received, or if the indictment is bad, the conviction is to be quashed.

ROBT. LUSH.

*Greenhow* for the prisoner.—The conviction was wrong on two grounds. The deposition was not admissible in evidence because it was not signed by the magistrate before whom it was taken, as required by the 11 & 12 Vict. c. 42, s. 17. It is contended that under that enactment the several depositions of the witnesses should be respectively signed by the committing magistrate, and that the magistrate's signature once only at the end of the examination is not sufficient. This point has not been decided in this Court as yet. In *Reg. v. Osborne* (8 Car. & P. 113), where three witnesses were examined before the magistrate, and the examinations of all three were on the same sheet of paper, the prosecutor being first, and the only signature of the magistrate was at the end of the last examination, after the words "Sworn before me," it was held that the deposition of the prosecutor, who had died before the trial, was admissible. Coleridge, J., said, "There may be a doubt whether each deposition should not be signed by the justice." His lordship then conferred with Lord Abinger, C.B., and afterwards said, "My own impression was that this was sufficient; if this had been the case of an affidavit it would have been bad, but that is on account of an arbitrary rule. In this case, however, there is no such rule, and Lord Abinger agrees with me in thinking, after the proof given by the justice's clerk (that the deposition was regularly taken and read over in the presence of the prisoner, and that he had an opportunity of cross-examining the prosecutor), that the deposition is admissible." That case was upon the statute of 7 Geo. 4. In *Reg. v. Lee* (4 Fos. & Fin. 63), where the depositions of several witnesses were taken before the magistrate on separate sheets of paper, and signed by the magistrate once at the end, and then the sheets of paper were attached together, Pollock, C.B., held that the depositions were properly signed, so as to render the depositions of one who died before the trial admissible in evidence. There is, however, the case of *Reg. v. Richards* (4 Fos. & Fin. 860), which is opposed to the above cases. There Cockburn, C.J., said that each deposition must be signed by the witness and the magistrate, and that it was not in compliance with the statute for the magistrate merely to sign at the end.

[COCKBURN, C.J.—At the time I so expressed myself my attention had not been called to schedule M.; when I saw that I thought my previous view was erroneous.] It is submitted that the form in schedule M. will not control the positive language of sect. 17, “and shall be signed also by the magistrate taking the same.” In *Reg. v. France* (2 M. & Rob. 207)—where a witness W., who had been examined and cross-examined before the magistrates, died before the trial, and his deposition was duly signed by the magistrates, but the cross-examination which had taken place on a subsequent day was not signed by the magistrates, but the depositions of two other witnesses on the prisoner’s behalf, which had been taken at the same time with the cross-examination of W., were pinned up along with it, and the last sheet of the whole was signed by the magistrates—Alderson, B., after consulting Parke, B., said, if the magistrate’s clerk could state that the sheets were all pinned together at the time the magistrates signed the last sheet, he thought he must receive the whole in evidence; but neither the magistrates’ clerk nor one of the magistrates being able so to state, the deposition as well as the cross-examination was rejected, although the magistrate stated that all the sheets were lying on the table when he signed them. The following cases were also cited: *Reg. v. Johnson* (2 Car. & Kir. 354); *Reg. v. Young* (3 Car. & Kir. 106). As to the second point, the indictment is bad for uncertainty in averring that the defendant “sold, lent, or deposited it as a security.” The rule is that averments must be certain and not in the alternative: (*Reg. v. Jones*, 1 Car. & Kir. 243; 1 East, P.C. 245; 1 Rus. on Crimes, 466.) Although this averment need not have been inserted, yet having been so it should have been alleged with certainty.

No counsel appeared for the prosecution.

COCKBURN, C.J.—I am of opinion that the conviction must stand, and that both objections fail. Upon the first point as to the admissibility of the depositions, we have the authority of two cases for their reception—the case of *Reg. v. Young*, a case before Mr. Greaves, sitting as a commissioner, and in which he took the opinion of Williams, J., as to the admissibility of the evidence; and the case of *Reg. v. Lee*, where Pollock, C.B., held that depositions signed in the same way as those now in question were admissible in evidence. In the case of *Reg. v. Richards*, at the Central Criminal Court before me, the same point arose, but my attention was called to the 17th section of the Act without any reference to the schedule. On reading the 17th section I was of opinion that that section, strictly construed, required that the deposition of each witness should be signed by the committing magistrate. After my decision, the clerk to the magistrates called my attention to the decided cases and the schedule. On looking at the two together, and seeing that the language of sect. 17 is not conclusive, and that the section says that such depositions

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shall be read over to and signed *respectively* by the witnesses, and that the word “respectively” is omitted when it speaks of the signature by the magistrate, and reading the section by the light of the schedule—which, after giving the form of the caption and the introductory part of the deposition of each witness, concludes, “The above depositions of C. D. and E. F. were taken before me,” and that the magistrate is then to affix his signature—I thought that the section did not exact from the magistrate that he should affix his signature to the deposition of each witness, but that it was enough if he attached it to the entire set of depositions as a body. Accordingly, I informed Mr. Oke, the magistrates’ clerk, that I had too hastily decided the point, and authorised him to state that I did not intend on any future occasion to abide by it. I think, therefore, looking at the section and schedule together, it is enough if the depositions are signed according to the form given in the schedule. These depositions were signed in that way, and I think that was sufficient to make them admissible. As to the second point, I have no wish to infringe on any general rule of criminal law, and think that where the indictment sets forth anything which it alleges as constituting the subject-matter of the offence we are bound by it; but where what is unnecessarily put in the indictment is plainly surplusage, it may be rejected. In the present case the offence consists in the having made a false declaration as to the loss of the pawn-ticket; but the indictment goes on to say, “whereas in truth he had not lost the said ticket.” If the indictment had stopped there it would have been sufficient, but it goes on further to state that the defendant had sold, lent, or deposited it as a security to one J. C. Now, what is this but only stating the evidence by which the falsity of the declaration was to be proved? If that had been the essence of the offence, and necessarily to be stated, there would have been ground for the argument of the prisoner’s counsel, but, as it is not, it may be treated as mere surplusage, and not vitiating the indictment.

BYLES, J.—I am of the same opinion. The statute intended plainly that the committing magistrate’s signature should be affixed to the whole depositions when attached together. If all the depositions had been written on one sheet of paper, the signature of the magistrate at the end would clearly have been sufficient, and it does not, in my opinion, make any difference that the several depositions have been sewn or attached together by some other means. As to the second objection, if the indictment had stopped at the averment, “Whereas, in truth he had not lost the said ticket,” it would have been sufficient; but it goes on to exhaust all suppositions for the defendant’s believing that he had lost it. This is clearly surplusage, and may be rejected.

The other judges were of the same opinion.

*Conviction affirmed.*



## COURT OF CRIMINAL APPEAL.

*January 22 and 29, 1870.**(Before COCKBURN, C.J., BYLES, J., KEATING, J., PIGOTT, B., and  
CLEASBY, B.)*REG. v. STAINER.<sup>(a)</sup>*Trades union—Embezzlement of funds by its officers—  
32 & 33 Vict. c. 61, s. 44.**An unregistered friendly society or trades union may prosecute its  
servants for embezzlement of its property, though some of its rules  
may be void as being in restraint of trade, and contrary to public  
policy.**Rules in a trades society or union imposing fines upon members for  
working beyond certain hours, or for applying for work at a firm  
where there is no vacancy, or for taking a person into a shop  
to learn weaving where no vacant loom exists, though void as  
being in restraint of trade, do not render the society criminally  
responsible.***C**ASE reserved by the Chairman of the Worcestershire Quarter  
Sessions for the opinion of this Court.

At the Worcestershire Quarter Sessions, held on the 3rd of  
January, 1870, a prisoner named James Stainer was tried before  
me on a charge of embezzling certain moneys received by him on  
account of the society known as "The Power Loom Carpet  
Weavers' Mutual Defence and Provident Association of Kidder-  
minster and Stourport."

This society was established many years ago under rules, of  
which a copy accompanies and is to be taken as a part of this  
case.

In March, 1868, these rules were revised, and such revised  
rules, of which a copy also accompanies and is to be taken as  
part of this case, have ever since been, and are now, in force, and  
define the object and the constitution of the society, and the  
duties of its several officers.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Neither the original nor the revised rules were enrolled or certified under the Friendly Societies Acts.

Some time before the revision of the rules the prisoner became a member of the society, and was duly appointed what was called a local secretary, to keep the accounts and collect the contributions of members of the society employed at the works of Messrs. Dixon and Co., of Kidderminster, and after such revision he continued to be a member of the society and to act under the 18th of the revised rules as such local secretary, until the embezzlement charged against him was discovered towards the end of October, 1869, and it was in respect of moneys received by him, as such local secretary, in September and the early part of October, 1869, that the charge of embezzlement arose.

It was proved by Robert Gillam, the general secretary of the society, who was called on the part of the prosecution, that the 34th and 35th of the revised rules had never been acted upon, that the 37th of the revised rules had been acted upon with respect to the clearance card therein mentioned, but not otherwise, and that the 36th of the revised rules had never been acted upon, except that two members, named respectively Thomas Painter and John Branford, who worked at the said Messrs. Dixon's, and who had each, at different times, taken a son into their working shed to learn weaving contrary to the provisions of the said 36th rule, were told that they would have to pay the fine mentioned in the rule, and both left the society to avoid such payment.

It was also proved by the said Robert Gillam, that, prior to the revision of the rules, the society had occasionally contributed towards the support of men out on strike, and that the last of such occasions was at Christmas, 1866, when a sum of 90*l.* was given to men out on strike at Stourport, and that on one occasion, since the revision of the rules, viz., on the 13th of May, 1868, a sum of 5*l.* per week was voted to some ironworkers and chainmakers who were out on strike. The following entry relating to the last-mentioned vote appears in the minute book of the society: "At a delegate meeting held at the Vine Inn, on Wednesday, May 13, 1868, the following resolution was unanimously passed: 'Proposed by Joseph Arnold, seconded by James Inston, that the ironworkers and chainmakers have the sum of 5*l.* per week granted to them from the funds so long as they are out, to be equally divided between them.'"

Except as above mentioned no evidence was given at the trial of any application of the funds of the society towards the support of men on strike, or for any illegal purpose.

There are between 500 and 600 members of the society, and their funds at the present time exceed 2000*l.*, invested in the savings bank in the names of several sets of trustees appointed for that purpose.

At the close of the case for the prosecution, Mr. Streeten and Mr. Jelf, on behalf of the prisoner, objected that the society was

proved to have been established, in part at least, for an illegal object, and that I ought on that ground to direct the prisoner to be acquitted. Nos. 30, 35, 36, and 37 of the revised rules(a) were principally relied upon as showing the illegality alleged, and the following cases were cited in support of the objection: *R. v. Hunt* (8 C. & P. 642); *Hornby v. Close* (L. Rep. 2 Q. B. 153); *Farrer v. Close* (L. Rep. 4 Q. B. 602.)

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I overruled the objection and refused to withdraw the case from the consideration of the jury, but I consented to reserve the point if necessary.

The trial accordingly proceeded, and the jury returned a verdict of guilty, whereupon the prisoner was sentenced to one year's imprisonment with hard labour, and he is now detained in Worcester Prison in pursuance of that sentence.

The question on which I respectfully desire the opinion of the Court for the Consideration of Crown Cases Reserved is, whether I was right in overruling the objection so taken on behalf of the prisoner, or whether such objection was valid in point of law, and entitled the prisoner to be acquitted.

(Signed)

R. PAUL AMPHLETT,  
Chairman of the above Court of  
Quarter Sessions.

*Streeten* (*Jelf* with him) for the prisoner.—The conviction was wrong. The relation of master and servant must exist to support a conviction for embezzlement, which is an offence created by statute. In this case the society was an illegal one, and the service in which the prisoner was engaged was consequently illegal, and the law does not therefore recognise the relation of master and servant in such a case. That such a society is illegal is shown by *Hornby v. Close* (15 L. T. Rep. N.S. 563) and *Farrer v. Close* (20 L. T. Rep. N.S. 801), where it was held that similar illegal rules prevented such a society from being able to take advantage of the summary remedy before justices provided by the Friendly Societies Act against a member who misapplied

(a) Rule 30. The hours of work allowed by the Factory Acts shall be the recognised work hours for members of this society, and any member infringing on such hours by working overtime—that is, by working before six o'clock in the morning, after six in the evening, after two o'clock on Saturdays, or meal hours, shall be fined 2s. 6d., and shall likewise be suspended from all the privileges of membership for twelve months.

Rule 35. Any member of this association making an application for work at firms where there is no vacancy, and thereby creating that spirit-crushing influence which all good men deplore, shall, upon proof of the offence, be fined 2s. 6d. in each and every case, such fines to be placed to the offender's arrears.

Rule 36. Any member of this society taking a person into a shop to learn the weaving where no vacant loom exists, and against the expressed wishes of his shop-mates, shall be fined 2s. 6d., and shall likewise be suspended from all the privileges of membership for twelve months.

Rule 37. Should any member leave one firm to work at another, he shall get a clearance card to certify his position with respect to this society, and if he is in arrears of his contributions, levies, fines, &c., he shall pay in the same to the secretary acting for the shop wherein he has obtained employment. And any member producing a false certificate shall be fined 1s., and any secretary wilfully drawing up a false certificate shall be expelled from his office.

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moneys of the society in his hands. Rule 36 of this society is much stronger and more illegal than the rules relied upon in those cases. [COCKBURN, C.J.—Those cases decided that the societies there in question were only so far illegal that they could not enforce civil contracts.] It is submitted that such a society cannot have property which can be embezzled. The prisoner was a servant only under the rules of the society. Such a service is not a lawful one, because the rules are not lawful. Service implies some duty which can be legally enforced, and the money received and embezzled must be money which can be recovered in a court of law. This is a society which is indictable at common law, its rules are illegal, as being against public policy, and they are also criminal in the sense of the society being a conspiracy to effect an unlawful object by illegal rules. *Hornby v. Close* followed the decision in *Hilton v. Eckersley* (6 Ell. & Bl. 47, 66), where the Court refused to enforce a bond by which a number of masters bound themselves to act according to the resolution of a majority in the employment of their workmen. In delivering the judgment of the Court Crompton, J., said: "I am of opinion that the bond is void, as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. The precedents of indictments for combinations of two or more persons to raise wages and for other offences of this nature, which were all framed on the common law, and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. In *Rex v. Mawbey* (6 T. R. 619) Grose, J., assumed the illegality of such combinations as well-known law. Combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower wages, were equally illegal." [COCKBURN, C.J.—What authority is there for saying that where half a dozen men or more agree not to work at a factory where machinery is used, or where more than a certain number of apprentices are taken, that such a combination, although it may be in restraint of trade, is a criminal offence?] Such an agreement is contrary to public policy. In 2 Russ. on Crimes, p. 442, it is laid down that a person cannot be convicted for embezzlement as a clerk or servant to a society which is illegal, as of a society where the members on admission took an unlawful oath: (*Rex v. Hunt*, 8 C. & P. 642.) The same rule is stated in Archbold's Crim. Plead., p. 412. In this case the defendant received the moneys which were to be applied in an illegal way. "The objection," says Lord Mansfield in *Montefiori v. Montefiori*, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff;

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by accident, if I may so say. The principle of public policy is this, *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *Potior est conditio defendentis*." It is submitted the same reason applies to the offence of embezzlement, and the Court will not lend its aid in the protection of funds to be applied to an illegal purpose. Any combination to do that which is an infraction of a civil right is indictable. A conspiracy for raising the prices of victuals or goods by forestalling or regrating, or to carry out a monopoly, is indictable at common law. So also is a conspiracy to force workmen to work at a particular rate of wages or for certain hours: (4 Broom & Hadley's Comm. 189, 190.) Notwithstanding the 32 & 33 Vict. c. 61, these are still indictable offences.

*J. O. Griffiths* for the prosecution.—The conviction was right. It may be that a partnership for an illegal object, such as in rule 22, cannot enforce its rights in the civil courts, but it is submitted that the society is not criminally illegal. In *Rex v. Hunt* every one of the members of the society was clearly indictable for the felony of taking and administering illegal oaths. The present is a case of a legal partnership having among its rules some very laudable and two or three in restraint of trade (rules 35, 36), which are therefore void. The rules which regulate the partnership are divisible, and those which are not illegal may be enforced in courts of law: (*Price v. Green*, 16 M. & W. 346.) Friendly societies which are not registered are nothing more than ordinary partnerships, and the secretaries and officers are the servants of the members: (*Reg. v. Tongue*, Bell's C. C. 289; *Reg. v. Meller*, 2 Moo. C. C. 249; *Reg. v. Redford*, 21 L. T. Rep. N. S. 508.) In the civil courts the agent of a party to an illegal contract cannot set up the illegality to an action by the principal against him: (*Tennant v. Elliott*, 1 Bos. & Pul. 3; *Sharp v. Taylor*, 2 Phil.) That this society is not criminal is shown by the stats. 6 Geo. 4, c. 129; 32 & 33 Vict. c. 61; 18 & 19 Vict. c. 63, which were passed to regulate similar societies, and are, in fact, a recognition of them. It may be that the funds of the society will never be applied to the purposes in rules 35 & 36. (He was then stopped by the Court.)

*Streeten*, in reply.—The 32 & 33 Vict. c. 61, and 18 & 19 Vict. c. 63, have no application, because this society was not registered under the Friendly Societies Act. The rules relied on render this

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society criminally indictable for a conspiracy. There is a precedent of an indictment (4 Went. 100) against journeymen leather dressers for a conspiracy not to work at any shop where apprentices were taken for a less period than seven years. In the cases cited on the other side the rules were rather irregularities and not illegal in substance affecting the constitution of the society.

COCKBURN, C.J.—I am of opinion that there is nothing in the circumstances of this case that affects the validity of the conviction, and that the conviction must stand. It is unnecessary to determine whether if a society be established for criminal purposes that would affect its legal title to the protection of its property, because in this society there are no rules that can be said to be of a criminal character. The principal purposes for which this society was established are lawful, but there may be one or two of its rules having reference to the employment of its members and wages which might come within the objects of a trades union provided they were carried out. According to the cases of *Farrer v. Close* and *Hilton v. Eckersley*, such rules would be illegal and void, and any contract arising on these rules would also be void, as being in restraint of trade and contrary to public policy, but the court, in those cases, carefully abstains from saying that there was any criminal illegality in the rules. I do not think that such rules must be considered as criminal, and as affecting the society's title to its property. It does not follow because rules may be against public policy that they are therefore criminal. The main objects of a society must be criminal before the question could arise. The late act (32 & 33 Vict. c. 61) has said that trades union societies are to have the privileges and advantages of the Friendly Societies Acts, which give a right to proceed against their officers for embezzlement of funds in a summary way before magistrates to conviction and punishment. It was urged that this statute only applies to societies registered under the Friendly Societies Act, but whether that be so or not, the statute may be regarded as an intimation of the Legislature that such societies should not be prevented from having the protection of the law against those persons who may embezzle their property. That enactment, therefore, shows that there is nothing of a criminal nature in such rules. It would be a great absurdity to say that, although such societies, when registered, could go before a magistrate and prosecute in a summary way to conviction, that they were prevented from preferring an indictment for the same offence at the assizes; yet that is what the argument for the defence comes to. I therefore think the conviction was right.

BYLES, J.—I also think that the conviction was right. The objects of the rules pointed out may be unlawful in the sense of being void, as in restraint of trade and contrary to public policy, but they are not unlawful as being within the criminal law.

KEATING, J.—I am of the same opinion. The only illegality



relied on is to be found in two rules, which are said to be illegal and void as in restraint of trade, and which could not be enforced in a court of law. Now, is that a criminal illegality that would deprive the society of the right to have the protection of the law to prevent its funds being plundered? It seems to me that it is not. The late act (32 & 33 Vict. c. 61), if confined to registered friendly societies, contains a clear indication of the intention of the Legislature that the mere fact of societies having rules that are void as being in restraint of trade shall not cause such societies to be deemed illegal so as to deprive them of the protection of the law in respect of their property. In the argument it was said that the society was indictable at common law, but in the absence of any authority for that position, it seems to me that it is not. There is no instance of any such indictment.

PICOTT, B.—I am of the same opinion. It is said that this society cannot hold property because its rules are illegal. Now, they are only illegal as being in restraint of trade, and not affecting their right to property. By the 32 & 33 Vict. c. 61, the Legislature has recognised their right to property, and provides that they may go before a magistrate and proceed summarily to conviction and punishment against persons who may have embezzled their funds.

CLEASBY, B.—I am of the same opinion.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*January 29, 1870.**(Before COCKBURN, C.J., BYLES, J., KEATING, J., PIGOTT, B., and  
CLEASBY, B.)*

REG. v. JOHN MARSHALL. (a)

*Embezzlement—Clerk or servant—Commission.*

*The prisoner was employed by a coal merchant under an agreement whereby "he was to receive 1s. per ton procuration fee payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment. Collections to be paid on Friday evening before 5 p.m., or Saturday before 2 p.m." He received no salary, was not obliged to be at the office except on Friday or Saturday to account for what he had received. He was at liberty to go where he pleased for orders :*

*Held, that the prisoner was not a clerk or servant within the statute relating to embezzlement.*

CASE reserved for the determination of the Court for the Consideration of Crown Cases Reserved by the Assistant Judge at the Middlesex Sessions.

John Marshall was tried before me at the Middlesex Sessions holden on the 15th of November, 1869, on an indictment which charged him with having feloniously embezzled several sums of money the property of George Tooley, by whom it was alleged he was employed as a clerk and servant.

The prisoner was employed by the prosecutor under an agreement dated 19th August, 1868, of which the following is a copy :

" 19th August, 1868.

" To Mr. John Marshall, Wells-buildings, Oxford-street.

" Terms of employment—*Re John Marshall*—1s. per ton procuration fee payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment. Collections to be paid in Friday evening before 5 p.m., or Saturday before 2 p.m. Cash orders 1s. 6d. per ton.

" G. TOOLEY."

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

At the trial three witnesses were called on behalf of the prosecution, who respectively proved that they had paid certain sums of money to the prisoner for and on account of goods supplied to them by the prosecutor, George Tooley, the orders for the said goods having been obtained by the prisoner.

In his examination in chief the prosecutor proved the above memorandum of agreement between the prisoner and himself, and further proved that the prisoner had not accounted to him for either of the three several sums of money which had been paid to him as above stated.

In cross-examination by Mr. Collins, who appeared for the prisoner, the prosecutor gave the following evidence: "I paid the prisoner commission, but no salary. He was not obliged to be at my office at any particular time, excepting on Friday or Saturday, to account for what money he had received for me. I did not give the prisoner directions to go to any particular place for orders. He went where he pleased."

Upon this evidence I thought the prisoner was acting as a clerk and servant, and that the mode of remunerating him was immaterial; but my attention being called to the case of *Reg. v. Bowers* (L. Rep. 1 Cr. Cas. Res. 41; 10 Cox Crim. Cas. 250; 35 L. J. 206, M. C.), I agreed to reserve the question.

I thereupon directed the jury to find the prisoner guilty, but respited the judgment until the opinion of the Court for the Consideration of Crown Cases Reserved should be pronounced upon the legal objection taken by the prisoner's counsel.

The question for the opinion of this honourable Court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant, so as to be liable to be convicted of the crime of embezzlement.

If the Court should be of opinion that the prisoner was not a clerk or servant within the meaning of the statute, the conviction is to be reversed, if otherwise the conviction to be upheld.

In the mean time the prisoner has been liberated on bail.

WM. H. BODKIN, Assistant Judge,  
Middlesex Sessions.

*Collins*, for the prisoner.—The conviction cannot be sustained, for the prisoner was not a clerk or servant, but an agent only. In *Reg. v. Walker* (27 L. J. 207, M. C.; 8 Cox Crim. Cas. 1) Bramwell, B., said, "It seems to me that the difference between the relations of master and servant and of principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." In the present case the prosecutor had no power to compel the prisoner to go out for orders. So again in *Reg. v. May* (8 Cox Crim. Cas. 421), where the prisoner, who was employed on the terms that for all business he did he would be allowed a commission, was held not to be

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a clerk or servant. [COCKBURN, C.J.—Can this case be distinguished from *Reg. v. Bowers*, (a) which is in point.]

*Metcalf* (*M. Williams* with him) for the prosecution.—It is stated in the case that the prisoner was employed by the prosecutor; that is evidence of the relationship of master and servant.

COCKBURN, C.J.—That is too vague. The prosecutor had no power to say to the prisoner “Go out and get orders;” but the agreement only amounts to this, “You shall be my agent to get me orders if you can, and if you do, you shall have such a commission.”

CLEASBY, B.—The prisoner was not even bound to go and receive the money for the orders he got.

BYLES, J.—In what part of the agreement is the obligation to serve to be found?

COCKBURN, C.J.—The case is clearly within *Reg. v. Bowers*, and the conviction must be quashed.

By the COURT,

*Conviction quashed.*

(a) In that case the facts were: A. engaged B. as agent or traveller for the sale of coals, at a salary of 1*l.* 1*s.* per week, and 1*s.* per ton as commission on coals sold to dealers procured by B. as customers. B. was to collect all moneys on account of his orders; the commission not to be due until the money was received by A.; moneys received by B. not to be kept more than one week in his hands. Afterwards, B. being desirous of selling coals on his own account, A. agreed to supply him with coals, and then made the following alteration in their agreement: “As you are now going into the retail coal trade on your own account, we think it best to have a proper understanding, and in future we pay you a commission only; your salary will be stopped from this date. There is a large amount against you, and we request you to do all you can to get it in.” Held, that B. was not a clerk or servant after the alteration in the original agreement.

## COURT OF QUEEN'S BENCH.

*February 14, 1870.*

(Before LUSH, J., and HANNEN, J.)

REG. v. PEARSON.

*Assault—Question of title to land—Excess of force—Jurisdiction of justices—24 & 25 Vict. c. 100, ss. 42, 46.*

*Sect. 46 of 24 & 25 Vict. c. 100 (sect. 42 of which act gives justices power of summarily convicting for assaults), which provides that nothing therein contained "shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom," takes away from justices all jurisdiction to determine cases of assault where any such question is shown to arise, and they cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands.*

**T**HIS was a rule to quash a conviction brought up by *certiorari*.

The conviction, dated the 7th of May last, was made under the hands of George Cressy Hill and Chas. Rowland Morewood, Esqrs., two justices of the county of Derby, whereby the defendant John Pearson was convicted for that he did unlawfully assault Robt. Turner contrary to the form of the statute.

The affidavit of the defendant set forth as follows:—

I am the owner of real estate in South Wingfield to a considerable extent, and I hold a conveyance to myself of a piece of land situate at South Wingfield aforesaid, over and in respect of which Robt. Turner, of South Wingfield, butler, on or before the 25th of April last, claimed certain rights or privileges, which rights I, the said John Pearson, claiming to be the owner of the said piece of land, disputed and do now dispute.

The said Robt. Turner is the owner, as I am informed and believe, of land and buildings adjoining the said piece of land mentioned in the first paragraph of this affidavit, and on the 29th of April last I went to the said piece of land mentioned in the

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first paragraph of this affidavit, and found thereon a quantity of bricks which the said Robt. Turner had, as I was informed and believed, carted or caused to be carted thereupon, and which said bricks I was informed were intended to be used by the said Robt. Turner for building purposes. I, not having a servant with me to do so, myself took some of the bricks and threw them over a wall near the said piece of land, intending thereby to assert that the placing of the said bricks upon the said piece of land was a trespass. After I had thrown some of the said bricks over the said wall the said Robert Turner came to me and seized a brick I held, and endeavoured to pull it out of my hand, and so prevent me from throwing the said bricks as last aforesaid, upon which I pushed him off from me, and with the force of the push he, the said Robert Turner, staggered backwards, down to the sloping side of an old sawpit, partly filled up with some materials, such sawpit being within four or five feet of where the said Robert Turner was standing, but the said Robert Turner did not fall down or lose his feet, although, as I am informed, he stated that he had to put out his hand to the ground to prevent himself from falling down or losing his feet; and I further say that I should not have touched the said Robert Turner if he had not, as aforesaid, endeavoured to force the said brick out of my hand.

On the 29th of April I consulted Messrs. Wilson and Burkinshaw as my solicitors as to taking such steps as they might deem expedient, to vindicate my title to the first hereinbefore mentioned piece of land, but left them without coming to any determination as to the steps to be taken, they advising me that it would be better for me to defend any proceedings which, from what had been said by the said Robert Turner, they my said solicitors and myself thought it probable would be instituted by the said Robert Turner, than that I should institute proceedings against him as plaintiff.

On Friday, the 13th of April, I received a letter of which the following is a copy:

“Alfreton, 29th April, 1869.

“Dear Sir,—Mr. Robert Turner has been at my office to-day in reference to his having this day laid some bricks on, and which he temporarily deposited on, a certain piece of uninclosed ground at South Wingfield, but with the intention of using such bricks for the improvement of his property which it adjoins. Mr. Turner states that you went to him and the men engaged, and forcible ejected Mr. Turner from off the uninclosed piece of land and violently assaulted him. Mr. Turner wishes to know by what authority or under what title you claim to dispute his using the piece of land in question?—Yours truly,

“BENJAMIN SAMUEL RICHARDS.

“John Pearson, Esq.”

And which said letter I believe came from the office of the said Benjamin Samuel Richards, now lately deceased, who was then acting as clerk to the justices in the Alfreton petty sessional



division within which South Wingfield aforesaid is situate. On the same day on which I received the last-mentioned letter I again consulted my said solicitors, and produced to them the said last-mentioned letter, who on Saturday, the 1st of May, wrote, and sent by post, as I am informed and believe, to the said Benjamin Samuel Richards, a letter, of which the following is a copy, namely :

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“ Alfreton, May 1, 1869.

“ Dear Sir,—Your letter of the 29th ult., addressed to Mr. Pearson, of Wingfield, has been handed by him to us, with instructions to reply thereto. Your letter seems to be written under a misapprehension of the facts. The land on which your client trespassed by laying of bricks thereon was land belonging to Mr. Pearson, to which he is able to deduce his title in the usual manner, in case the conduct of your client was intended to assert claim to the land as against Mr. Pearson. Mr. Pearson observing that your client had placed bricks on the said land was, in confirmation of the information which he gave to your client that he was trespassing on the land, proceeding to remove from the land some of the bricks, when he was forcibly interfered with by your client with the object of preventing him so doing, and the alleged assault mentioned in your letter was the action of Mr. Pearson in repelling with no more than the necessary force your client, when he so forcibly interfered with Mr. Pearson, and in fact resisting an assault upon himself, respecting which and the trespass before mentioned Mr. Pearson had already consulted us before the date of our letter. If you have any further communication to make on the subject, we request you will make it to ourselves.

“ We are, yours truly,

“ WILSON AND BURKINSHAW.

“ B. S. Richards, Esq.”

I directed my said solicitors to reply to the aforesaid letter of the said Benjamin Samuel Richards as aforesaid, because I understood from the letter, and more especially from the latter part of such letter, in which it is said, “ Mr. Turner wishes to know by what authority or under what title you claim using the piece of land in question,” that the said Robert Turner and the said Benjamin Samuel Richards, as his solicitor, contemplated instituting civil proceedings respecting the said piece of land, or the acts hereinbefore mentioned ; and because, moreover, immediately after the happening of the events mentioned in the second paragraph of this affidavit, the said Robert Turner threatened me, saying to me the following words, “ I’ll clap a writ on your back for this,” or words to the like effect.

Late on the evening of Tuesday, the 4th day of May last, I was served with the magistrates’ summons dated the 1st of May. I instructed the said John Burkinshaw, as my attorney, to appear on my behalf in answer to such summons, to show to the justices that a question as to the title to the said piece of land arose, and

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on my behalf to submit to the said justices that under the circumstances the charge mentioned in the said summons ought not to be adjudicated upon by them.

On the 7th of May the defendant's attorney attended and offered evidence as to the dispute of title, and contended that the justices had no jurisdiction to go on with the case, and quoted 24 & 25 Vict. c. 100, s. 46. The justices, however, said they would hear the case, and finally convicted the defendant.

24 & 25 Vict. c. 100, s. 4, enacts that—"Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds; and if such fine as shall be so awarded, together with the costs (if ordered) shall not be paid, either immediately after the conviction, or within such period as the said justices shall, at the time of the conviction, appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid."

Sect. 46 provides—"That in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same; provided also that nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

*Robinson*, Serjt., now showed cause against the rule, and contended that, notwithstanding title came in question, still the magistrates had jurisdiction to adjudicate upon and punish the assault where it was shown to them that excessive force or violence had been used in the assertion of the alleged right. [LUSH, J.—The proviso in sect. 46 is very wide—"that nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands," &c. Does not that override the whole preceding part of the Act?] It is submitted that it does not take away any jurisdiction which justices

previously had to adjudicate in cases where excessive violence was used. It was not the intention of the act to take away any jurisdiction which they formerly had, but rather to enlarge it. The information in the present case charged only a common assault, and where excessive violence is used in the vindication of an asserted right, the magistrates may surely treat the excess as a common assault, and adjudicate upon it alone. [LUSH, J.—Granting that there was such an excess as would have been indictable, can the magistrates adjudicate upon that matter summarily where the dispute arises out of a title to lands? This is what I doubt.] There is nothing in the affidavit to show that the question of title was raised before the magistrates. [LUSH, J.—The letter of the respondent's attorney was before them, in which the complaint is chiefly of the trespass. HANNEN, J.—And I cannot see how the excess of violence can be separated from the original assault, which was committed in the assertion of a title to land.] (*Re Thompson*, 30 L. J. 19, M. C.; 3 L. T. Rep. N.S. 409, was referred to.)

*G. Bruce*, in support of the rule, was not called upon.

LUSH, J.—I think we need not trouble the other side. I am of opinion that the rule must be made absolute. It appears very clearly from the facts in the affidavit not contradicted on the other side, that the assault, the subject of the charge before the magistrates, was committed in the course of an assertion of title on behalf of the defendant. The prosecutor had entered upon land which the defendant had claimed to be his, and in order to get him off the land the assault in question was committed, not wantonly or for the purpose of injuring the prosecutor, but as an act asserting the defendant's right to the land and his right to turn every one else off it; and it further appears that that was brought to the notice of the magistrates. That being so, I am of opinion, on the construction of the 46th section of the 24 & 25 Vict. c. 100, that the jurisdiction of the magistrates was at an end, and that they had no right to determine whether the assault was excessive or not. I think the words of the 46th section which show that are beyond all doubt. The jurisdiction which the magistrates have to deal summarily with the case of an assault committed is given by the previous sections of the same act. Then comes the 46th, which contains these provisions:—"That nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." The section does not say that the jurisdiction of the magistrates shall be ousted so far as the question may turn on a disputed title to lands; but that nothing therein contained shall give them jurisdiction to determine any case where such a question shall arise. I think, therefore, as a question of title to lands arose in this case, and the fact was brought to the notice of the magistrates, they should have held

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their hands, and come to the conclusion that they had no jurisdiction to determine the matter. They did not do that, however; but, acting on the advice of their clerk, seem to have gone against their own better judgment. I must say it is much to be regretted that they did act on his advice, when it was brought to their knowledge that he was the solicitor of the prosecutor in the case, and therefore an interested party. It appears that he had written to the defendant, threatening proceedings, besides acting as the prosecutor's solicitor in the hearing of the case before them. I think I ought not to omit the opportunity of saying that when this was brought to the notice of the justices they should not have acted on his advice. If they had acted on their own opinion they would have done properly, and not have suffered themselves to be led into error. Under the circumstances of the case, we can do nothing else than quash the conviction.

HANNEN, J.—I am of the same opinion.

*Conviction quashed.*

Attorneys for justices, *Aldridge* and *Thorn*.

Attorneys for defendant, *Real* and *Philpot* for *Wilkinson* and *Burkinshaw*, *Alfreton*.

## COURT OF QUEEN'S BENCH

*April 23, 1870.*

(Before COCKBURN, C.J., BLACKBURN, J., MELLOR, J., and  
HANNEN, J.)

REG. (on the prosecution of the Attorney-General) *v.* HAMILTON  
KINGLAKE.

*Evidence—Refusal of witness to give evidence on account of its  
criminating him—Objection overruled—Motion for a new trial.*

*The privilege of refusing to answer questions on the ground  
that they tend to criminate is that of the witness alone, and  
neither party to the suit can take any advantage therefrom.*

*A witness called on the part of the Crown to prove bribery against  
the defendant, refused to give evidence on the ground that his  
evidence would tend to criminate himself, the objection being  
overruled by the judge, he gave his evidence :*

*Held, that the defendant could not object that such evidence was  
improperly received.*

THIS was an application for a rule at the instance of the  
defendant, calling upon the Attorney-General to show  
cause why a new trial should not be had herein, and why a  
verdict should not be entered for the defendant upon the second  
and third counts of the information.

The facts were as follows:—The Attorney-General had filed  
an information against Dr. Hamilton Kinglake and Mr. Henry  
Lovibond for certain misdemeanors connected with the last  
Parliamentary election for the borough of Bridgewater.

The information contained four counts—1st, for bribery ; 2nd,  
for a conspiracy to bribe ; 3rd, for a conspiracy corruptly to  
expend 500*l.* in bribery ; 4th, for a conspiracy to advance 500*l.*  
for the purposes of corruption.

As far as regarded Mr. Lovibond, the Attorney-General had,  
in consequence of the expression of the opinion of the Court of  
Queen's Bench in *Reg. v. Price and others, Ex parte Lovibond*,  
(22 L. T. Rep. N. S. 12), abstained from further proceeding  
against him, and the information stood for trial against Dr.  
Kinglake alone.

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At the trial at the last assizes at Taunton, before Hannen, J., the Crown called Mr. Lovibond as a witness; but upon being sworn he declined to give evidence, on the ground that his name was still included in the information; and that two actions were pending against him for penalties for bribery at the said election. Upon this it was announced by the Solicitor-General that a *nolle prosequi* had been entered as to Mr. Lovibond, and a free pardon was at the same time handed to him. He still declined to give evidence, alleging that a pardon would be no protection to him against the actions. The question having been argued, and the 14 & 15 Vict. c. 99, s. 3; 17 & 18 Vict. c. 102, ss. 3, 14, 35; and the 26 & 27 Vict. c. 29, ss. 5 and 7 referred to, the learned judge held that Mr. Lovibond was compellable to give evidence, and he gave his evidence accordingly, without which, as was admitted, no case could have been made out against Dr. Kinglake. The jury returned a general verdict of "guilty."

Sir J. Karlake, Q.C. (*Charles* and *H. Kinglake* with him) now moved for a new trial, and argued that the objection of Mr. Lovibond to give evidence was well founded. (It is unnecessary to give the argument upon this point, as the judgment did not turn upon it.) He contended, also, that as the evidence of Mr. Lovibond, after his objection to give it, was wrongly received, Dr. Kinglake had a right to avail himself of the objection upon this point. The following cases were cited by counsel, or referred to by the Court: *Dandridge v. Oorden* (3 Car. and Pay. 11); *Roberts v. Allatt* (1 Moo. & Mal. 192); *Doe d. Earl of Egremont v. Date* (3 Q. B. 609); *Reg. v. Boys* (1 Best & S. 311).

COCKBURN, C.J.—I am of opinion that there should be no rule in this case. An objection is taken by Sir John Karlake that Mr. Lovibond, whose evidence was essential to this conviction, was, under the circumstances, not bound to give evidence, but that, having been compelled to do so, his evidence was improperly received. Now, in the first place, I am not satisfied that he had any such privilege as he claimed, my strong opinion being that none such existed, and that he was compellable to give the evidence required of him. It is admitted that the pardon protected him against any criminal proceeding; but it is said that it affords him no protection against actions for penalties, and that there are actions now pending against him. I entertain very great doubt whether the privilege of a witness extends to not answering questions which may be used against him, not in a criminal proceeding but in an action for penalties. But it is not necessary for me to rest my judgment upon that ground, for I desire to place it upon a wider basis. I am of opinion that Mr. Lovibond was the only party who could take any exception to his answering; and that the privilege of refusing to be examined cannot be taken advantage of by any other party. By refusing to be examined, the witness may have exposed himself



to imprisonment for contempt, or to a fine. But that merely concerns the witness himself. If he chooses to give his evidence voluntarily it would be perfectly good evidence, and it would not be illegal evidence in any sense whatever, and there could be no cause of complaint. If so, what difference does it make that he has given his evidence in consequence of some coercion which has been put upon him? I can see no reason for saying that when the witness is compelled to answer, although he might have objected, that is a ground of objection on the part of either of the litigants.

BLACKBURN, J., after referring to the section of the statute and expressing an opinion that the witness was bound to give evidence, said: But assuming that my brother Hannen was wrong, and that some injustice was done to Mr. Lovibond, there was no injustice done to the defendant. The privilege is that of the witness, and if he waives it it is his own affair. But if, instead of giving his evidence voluntarily, he gives it under compulsion, what is the difference? The party in the suit is not injured. The only case cited upon this point is *Doe d. Earl of Egremont v. Date* (3 Q. B. 609). But granting that a wrong was done to the witness, it is a ground of complaint for him and no one else.

MELLOR, J.—I am entirely of the same opinion upon the last ground. It is clear that if Mr. Lovibond had made no objection his evidence would have been receivable, and it really can make no difference that he objected and was compelled to give his evidence.

HANNEN, J., concurred.

*Rule refused.*

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## COURT OF CRIMINAL APPEAL.

*April 30, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. THE INHABITANTS OF THE UPPER HALF HUNDRED OF CHART  
AND LONGBRIDGE.(a)

*Bridge—Liability to repair—Hundred—5 & 6 Will. 4, c. 50.*

*The 5 & 6 Will. 4, c. 50, s. 5, does not transfer to parishes the liability to repair a bridge, which the inhabitants of a half hundred have always repaired out of the hundred rate made on the half hundred.*

CASE reserved for the opinion of the Court for the  
Consideration of Crown Cases Reserved.

At the general quarter sessions of the peace, held at St. Augustine, near Canterbury, on the 29th June, 1869, James Adams and Charles Tanton, as representing the inhabitants of the upper half hundred of Chart and Longbridge, in the county of Kent, were tried upon an indictment which charged the said inhabitants with permitting one of the hundred bridges to be out of repair.

It was proved to the satisfaction of the jury that the bridge in question was situate within the upper half hundred of Chart and Longbridge, that it was out of repair and dangerous, and that from time immemorial the repairs of that bridge and all other hundred bridges within the upper half hundred had always been done at the expense of the inhabitants of the half hundred, out of a hundred rate made and levied in the said upper half hundred.

*Primâ facie* everything was proved which would entitle the Crown to a verdict, but it was contended, on the part of the defendants, that since the Highway Act, 5 & 6 Will. 4, c. 50, hundred bridges are repairable as highways by the parishes in which they are respectively situate, and that the inhabitants of any hundred or other division of a county are no longer indictable for the non-repair.

The jury found the defendants guilty, and the Court decided upon reserving the point raised for the consideration of the Court

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

for the Consideration of Crown Cases Reserved, and respited the judgment until the decision shall be given.

The opinion of the Court is requested upon the following question, viz.: Whether a public bridge, which has from the time whereof the memory of man runneth not to the contrary been repaired by a hundred, is, since the statute 5 & 6 Will. 4, c. 50, not repairable by the said hundred?

If the Court shall be of opinion that it is repairable by the hundred, the verdict is to stand; if otherwise, the verdict is to be set aside, and a verdict of "not guilty" entered.

THOMAS SYDENHAM CLARKE,  
Chairman of the above Sessions.

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*Biron* for the defendants.—In considering this case, it is necessary to regard the course of legislation upon the subject of bridges. Generally speaking, parishes are liable for the repair of the highways within them; but in the case of bridges, county bridges (which are bridges in connection with the main highways) have been, from time immemorial, repaired only out of the county rates, while hundred bridges, or bridges in connection with bye-roads or highways less used, have been by prescription repairable by rates on the hundreds, or a collection of parishes. In the Highway Act (13 Geo. 3, c. 78) there is a series of provisions, giving facilities to surveyors of the highways for getting materials for the making and repair of highways. That statute makes no mention of bridges, and the 43 Geo. 3, c. 59, s. 1, was passed for the purpose of extending those provisions to surveyors of county bridges (*eo nomine*). Then the 54 Geo. 3, c. 90, was passed to extend the 43 Geo. 3, c. 59, to bridges and other works maintained at the expense of the hundreds. County and hundred bridges are also spoken of (*eo nomine*) in the 55 Geo. 3, c. 143, s. 5. The Legislature, therefore, has distinctly recognised the two classes of bridges. This 13 Geo. 3, c. 78, has not been repealed, so far as relates to bridges, by the 5 & 6 Will. 4, c. 50: (*Reg. v. The Inhabitants of Merionethshire*, 6 Q. B. 343; *Reg. v. Brecknockshire*, 15 Q. B. 813.) By the 5 & 6 Will. 4, c. 50, s. 5 (the interpretation clause) it is enacted that in the construction of that act the word "highways" shall be understood to mean "all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements." There being, then, a recognised distinction between county bridges and hundred bridges; hundred bridges, by virtue of that enactment in the 5 & 6 Will. 4, c. 50, are now to be treated as highways, and are governed by the 5 & 6 Will. 4, c. 50. Then the 5 & 6 Will. 4, c. 50, s. 21, enacts "that if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish,

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person, or body politic or corporate, or trustees of a turnpike road, who were by law, before the erection of the said bridge, bound to repair the said highways: Provided, nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeways to any such bridge, or the land arches thereof." Sects. 22 and 27 were then referred to. Sect. 62, which prescribes the proceedings by which highways repairable by any persons or bodies corporate, *ratione tenuræ*, or otherwise, may be made parish highways, does not control the enactment in sect. 5. [WILLES, J.—You must show by negative evidence that the hundred is not now liable to repair its bridges.] It is contended that sect. 5 of 5 & 6 Will. 4, c. 50, removes the liability to parishes to repair hundred bridges as well as its highways.

*Barrow* for the prosecution.—It was found that the bridge had always been repaired by the inhabitants of the half hundred. It is either a half hundred bridge or a county bridge; and in either case the 5 & 6 Will. 4, c. 50, does not apply. The term county bridge has no real meaning; it only means a bridge repairable by the inhabitants of the county. The interpretation clause of the 5 & 6 Will. 4, c. 50, defines "parish" to mean, among other things, "wapentake, division, or any other place or district maintaining its own highways." Therefore, if the bridge is repairable by the parish, construing parish by the interpretation clause, it is still repairable by the wapentake, division, or district within which it is situated. [He was then stopped.]

BOVILL, C.J.—In dealing with the statute 5 & 6 Will. 4, c. 50, we must consider the state of the law previously existing to which it has reference. Previously there was one set of statutes regulating highways and another regulating bridges. The 5 & 6 Will. 4, c. 50, was an act for the consolidation of the laws relating to highways, and does not refer to bridges. That Act seems to relate to highways only as distinguished from bridges; but by the interpretation clause the word "highways" is to be construed to mean, among other things, "bridges not being county bridges." Now it is contended that under that clause, county bridges only being excepted by it, a hundred bridge must be considered as part of the highway. The term "county bridge" is not a term known to the law, but is merely a compendious term for a public bridge which the county is liable to repair. It is not stated in an indictment for non-repair of a county bridge that it is a county bridge, but that there is a liability on the inhabitants of the county to repair it. There may be a liability on the part of the inhabitants of the hundred, or a division of the county, or of the inhabitants of a county, to repair a bridge. There is no difference in principle, all bridges over a stream are county bridges although repairable by a hundred or division of the county, and not by the county at large. In some

of the statutes a distinction is made between county bridges and hundred bridges as pointed out in the argument by Mr. Biron. The interpretation clause sect. 5 of the 5 & 6 Will. 4, c. 50, in my opinion includes in the words "county bridges" all public bridges although repairable by divisions of the county. There is nothing in the affirmative enactments of the 5 & 6 Will. 4, c. 50, to take away the liability of persons to repair a highway under previous statutes, and there is no reason for holding that it was intended to take away the liability to repair public bridges, which particular divisions of a county were liable to repair.

The rest of the COURT concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*April 30, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. DAY AND COX. (a)

*Practice—Abandoning counts—Indictment.*

*The first count of the indictment charged prisoners under the 9 Geo. 4, c. 69, s. 2, with being found on land, at night, armed with a gun for the purpose of taking game, by A. and B., who had lawful authority to apprehend them, and that, A. and B. being about to apprehend them, the prisoners with a weapon assaulted and wounded A. and B.*

*The second count charged an unlawful wounding.*

*The third and fourth counts charged a common assault.*

*At the close of the prosecution the counsel for the prosecution abandoned the last three counts, and elected to stand on the first count. The jury returned a verdict of guilty of night poaching and a common assault.*

*Upon a question raised whether the prisoners could be convicted of a common assault upon the first count :*

*This Court held that, the prosecuting counsel having withdrawn the counts for common assault from the jury, the prisoners ought to be acquitted.*

CASE reserved for the opinion of the Court for the  
Consideration of Crown Cases Reserved by the Right  
Honourable the Earl of Chichester, chairman.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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At the General Quarter Sessions holden at Lewes, in and for the eastern division of the county of Sussex, on Tuesday, the 4th of January, 1870, George Day and Thomas Cox were tried on the following indictment:

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*First count.*—Sussex, to wit.—The jurors for our Lady the Queen upon their oath present, that at the time of the committing of the assault hereinafter mentioned, to wit, on the 10th of December, in the year of our Lord 1869, in the night time, to wit, about the hour of eleven in the night of the same day, George Cox and Thomas Day were unlawfully in certain land, to wit, a certain wood called “Downe Copse,” in the occupation of one Frederick Smith, situate at the parish of Barcombe, in the county of Sussex, armed with a gun, for the purpose of then and by night as aforesaid unlawfully taking and destroying game, and that they, the said George Cox and the said Thomas Day, then so being in the said land or wood called “Downe Copse” as aforesaid, by night as aforesaid, armed with the said gun for the purpose aforesaid, were found by one Joseph Packham, a servant of the said Frederick Smith, and by one Charles Osborn, a person assisting the said Joseph Packham, the said Joseph Packham and the said Charles Osborn having lawful authority to seize and apprehend the said George Cox and the said Thomas Day. And the jurors further present that they, the said Joseph Packham and the said Charles Osborn, being then about to seize and apprehend the said Thomas Day for the offence aforesaid, they, the said Joseph Packham and the said Charles Osborn, having lawful authority so to do, they, the said George Cox and the said Thomas Day, with a knife or some other offensive weapon which they, the said George Cox and the said Thomas Day, held in their hands, did then unlawfully assault, wound, or offer violence towards the said Joseph Packham and the said Charles Osborn, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

*Second count, unlawful wounding:* And the jurors aforesaid, upon their oath aforesaid, do further present that one Thomas Day, on the 10th of December, 1869, did unlawfully and maliciously wound and inflict grievous bodily harm upon one Charles Osborn, with intent in so doing thereby then to resist and prevent the lawful apprehension of himself, the said Thomas Day, against the peace of our Lady the Queen, her crown and dignity, and against the form of the statute in such cases made and provided.

*Third count, common assault:* And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Cox and the said Thomas Day, on the 10th of December, 1869, did make an assault in and upon one Charles Osborn, and him, the said Charles Osborn, did beat, wound, and illtreat, and other wrongs to the said Charles Osborn then did, to the great damage of the said Charles Osborn, against the form of the statute in such case made and provided.



*Fourth count, common assault:* And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Cox and the said Thomas Day on the 10th of December, 1869, in and upon one Joseph Packham did make an assault, and him, the said Joseph Packham, did then beat, wound, and illtreat, and other wrongs to the said Joseph Packham did, to the great damage of the said Joseph Packham, against the form of the statute in such case made and provided.

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The following was the evidence :—

B. H. Hunt, solicitor, knows the property of Mr. Smith in Barcombe: the wood is a part of what he purchased.

Charles Osborn, gamekeeper to Mr. Sclater, of Newick-park, which adjoins Mr. Smith's property: Was out with J. Packham and Martin the 10th of December at night; Martin is in Smith's employ. I heard firearms about half-past eleven o'clock. I was about a quarter of a mile from Downe Copse-wood, Mr. Smith's, where the report came from. We made the best of our way to the place. When in the ride we heard some one in the underwood. We stood still, then Day came out, I seized him and said, "Hollo, my man, what are you up to here?" Something fell on my toes, which I believe to have been a gun. Day tried to get away. We had a dreadful struggle for five or ten minutes, and then I felt an open knife in his hand. I took hold of the blade; I then seized him by the right wrist and called to Martin to assist, and told him about the knife. Cox then cried out to Day, "Kill the b——." Just at that moment I felt my hand cut by Day. Martin went back to help Packham, and then came to me and we tied Day's hands. I took a cock pheasant quite warm out of Day's pocket. On the road we had another struggle. Day had said, "Now, mate, let's have another try." Police-constable Dive and I went next morning to the place where I first took hold of Day and found the gun now produced.

Cross-examined; We heard the men walking in the wood after we had got about 300 yards down the ride. It was a very dark night. I held his necktie with my left hand. I produce what I had in my hand. I struck him with this after he cut me with the knife. I hit him about the head twice. I was alone. We were both down. He first cut his necktie. I believe the knife was found shut at the same place as the gun next morning.

Joseph Packham, assistant gamekeeper to Mr. F. Smith: On the 10th of December was out with Osborn and Martin on Mr. Sclater's land, and about half-past eleven we heard fire-arms in Downe Copse, and went in that direction and found Day and Cox. I took hold of Cox and tried to throw him down. I stepped into a ditch and fell. Cox had hold of my hair and tried to throw my head back in the ditch. I called Martin, and he came to my help. We struggled for five or ten minutes. Cox had a stick in his hand while we were struggling. Cox said "If you get up, you b——, I'll kill you." I had another struggle,

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and then I called to Martin again, and we tied his hands. Martin then went to assist Osborn. Going along towards my house we had another struggle.

Cross-examined: We had been out about half an hour before we heard the gun. When Cox said he'd kill me I had my life preserver.

James Martin, assistant gamekeeper to Mr. Sclater: Was out with others. When we had been a few minutes in the wood, these two men came up. I assisted Packham and helped to hold Cox down. We were struggling near a quarter of an hour, and then Cox was quite still. Osborn called out for help, and said "My man's got his knife." I went and assisted Osborn, and then went back again to help Packham. I heard him say he'd kill Cox. I tied his hands and afterwards Day's. After we were in the road we had another bit of a struggle.

Edward Dive, P.C.: On the 11th of December was called to gamekeeper's house (Mr. Smith's gamekeeper) and received two prisoners. I searched both; found nothing on Day; on Cox a knife, some shot, and gun caps. About eleven same morning I found the gun loaded, now produced, four hats, and a cap, and a bludgeon. I also found this knife shut up just where the struggle took place.

After the evidence for the prosecution was closed, upon the application of the counsel for the prisoners, the last three counts were, with the consent of the Court, abandoned, and the counsel for the prosecution elected to stand on the first count.

I directed the jury, on application of the counsel for the prosecution, that they might find the prisoners guilty of a common assault under the first count.

The verdict of the jury was "guilty of night poaching and a common assault," and, in answer to a question put by me, the jury said "they were of opinion the knife was not used intentionally."

Upon this finding, the counsel for the prisoners contended that such a verdict amounted to one of acquittal, and I and some of my colleagues having some doubt whether my direction was right in point of law, and whether, upon such finding, the prisoners could, under the circumstances, be convicted of a common assault, ask the opinion of the Court for Consideration of Crown Cases Reserved upon it.

If the Court shall be of opinion that the prisoners might, under the above circumstances, be convicted of a common assault upon the first count of the indictment, then sentence will be passed upon the prisoners; but if, on the other hand, the Court shall be of a contrary opinion, then a verdict of not guilty will be entered accordingly.

The prisoners were liberated on their own recognisances to appear to receive judgment when called upon.

CHICHESTER,  
Chairman of Quarter Sessions.

No counsel appeared to argue for the prisoners.

*Willoughby* for the prosecution.—The first count of the indictment was framed upon the 9 Geo. 4, c. 69, s. 2, which enacts that where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, firearms, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner. Upon the first count the prisoner may be convicted of a common assault. It is not material that the assault should be committed with a weapon. If a person uses his fists only to commit the assault, he may be convicted under the above section. The word "assault" is in the indictment, and *Reg. v. Taylor* (11 Cox Crim. Cas. 261; L. Rep. 1 Cr. Cas. Res. 194) shows that upon an indictment for unlawfully and maliciously wounding or inflicting grievous bodily harm a verdict for a common assault may be returned. In *Reg. v. Yeadon* (9 Cox Crim. Cas. 91; L. & C. 81), upon an indictment containing counts for inflicting grievous bodily harm, and unlawfully and maliciously cutting and stabbing and unlawfully occasioning actual bodily harm, it was held that a verdict of guilty of a common assault might be returned. [WILLES, J.—At the trial the count for common assault was abandoned. How, then, can the prosecution ask for a conviction now for a common assault?] The attention of the Court at the trial was drawn to the decisions, upon the authority of which it is contended that the prisoner may be convicted of a common assault on the first count. [WILLES, J.—*Reg. v. Taylor* is tenable on the ground that the second count, in that case occasioning actual bodily harm, was a good count at common law.]

BOVILL, C.J.—There is much difficulty in dealing with this case in consequence of the counsel for the prosecution electing at the trial to abandon the counts for common assault. After that

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course had been adopted, it can scarcely be considered that the prisoner had a full opportunity afforded to him of presenting his entire defence to the jury. There is this further difficulty. The jury have found the prisoner guilty of night poaching and a common assault, and it would also appear on the record that he was acquitted of a common assault. We therefore think the conviction ought not to stand. It is unnecessary to say whether the prisoner might or might not be convicted of a common assault upon the first count.

WILLES, J.—The decision proceeds only on the ground of the course adopted at the trial in electing to abandon the charge of common assault. As to the question whether the prisoner could properly be convicted of a common assault upon the first count, I think that he could not. The abandoning the count for common assault was calculated to throw the prisoner off his guard, and prevent him being fully heard against it.

BYLES, J.—I also agree that the conviction cannot be sustained, on the grounds stated by my learned brothers.

HANNEN, J.—The counsel for the prosecution having deliberately abandoned the count for common assault, I think this conviction ought not to stand.

CLEASBY, B., concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*April 30 and May 4, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. JESSE SMITH. (a)

*Feloniously receiving—Partners—24 & 25 Vict. c. 96, s. 91, and  
31 & 32 Vict. c. 116, s. 1.*

*A partner stole goods belonging to the firm, and rendered himself  
liable to be dealt with as a felon under the 31 & 32 Vict. c. 116,  
s. 1, and sold the same to the prisoner, who knew of their having  
been stolen.*

*Held, that the prisoner could not be convicted on an indictment for  
feloniously receiving under the 24 & 25 Vict. c. 96, s. 91, but  
might have been convicted as an accessory after the fact under the  
24 & 25 Vict. c. 94, s. 3, on an indictment properly framed.*

CASE reserved for the opinion of this Court by Arthur  
R. Adams, Esq., sitting as Commissioner at the Spring  
Assizes, 1870, on the Midland Circuit.

Jesse Smith was indicted for receiving certain goods, the  
property of George Morton and another, knowing the same  
to have been feloniously stolen, and was tried before me at the  
last Assizes for the West Riding of Yorkshire, at Leeds.

The facts of the case were as follows :

George Morton was in partnership with one R. F. Martin, at  
Leeds, and carried on business in that town as ironmongers  
under the firm of R. F. Martin and Co. The goods sold there  
were principally supplied by William Morton, of Birmingham,  
trading under the firm of Haines and Morton.

In consequence of certain rumours as to the solvency of his  
firm, George Morton came to Leeds on the 13th of December,  
1869, and made arrangements with his partner, R. F. Martin, to  
secure the debt due to Haines and Morton, by giving a bill of sale,  
of the goods then in the shop, and whilst this document was being,  
prepared George Morton left Leeds and went to Sheffield.

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During his absence, his partner, R. F. Martin had interviews with the prisoner, and before the return of George Morton shut (the 14th of December) up the shop, and in the evening of the following day (the 15th of December) he hired drays, and in the presence of the prisoner conveyed the whole of the goods to the house of the prisoner, who apparently paid 100*l.* for them to R. F. Martin. The goods were proved to be worth considerably more than 300*l.*

From conversations with William Morton, the father of George Morton, it was evident that the prisoner was aware of the intended bill of sale, and that R. F. Martin was disposing of these goods in fraud of his partner, and to prevent the operation of the bill of sale.

It was objected on the part of the prisoner, that even if it were proved that R. F. Martin had committed an act of felony against his partner under the provisions of 31 & 32 Vict. c. 116, s. 1, and that he had been guilty of larceny of the partnership goods, yet that the prisoner could not be indicted for receiving such goods, knowing them to be stolen, as that statute had not made such receiving a felony, and that under the provisions of the Larceny Consolidation Act (24 & 25 Vict. c. 96, s. 91), only persons who received goods, the stealing of which amounted to a felony either at common law or under the provisions of that act, could be indicted as receivers; and as the stealing by a partner was not a larceny at common law, nor under the provisions of the Consolidation Act, no receiver of such goods could be indicted for a felony.

As this was the first case that had occurred since the passing of the act 31 & 32 Vict. c. 116, and thinking it more prudent that a point of such importance should be decided by a court of appeal, I declined to stop the case.

The jury finally found the prisoner guilty of receiving the goods, knowing them to be stolen, and I released the prisoner on good bail to appear at the next assizes if necessary.

I have now to request the opinion of the Justices of either Bench and the Barons of the Exchequer, whether this prisoner has been properly convicted.

ARTHUR R. ADAMS,  
Commissioner of Assize on the  
Midland Circuit.

*Waddy* for the prisoner.—It is submitted that this conviction cannot be sustained. The point arises on the construction of the stats. 24 & 25 Vict. c. 96, s. 91, and the 31 & 32 Vict. c. 116, s. 1. The former statute enacts that whosoever shall receive any chattel, money, &c., or other property, the stealing, taking, or embezzling whereof shall amount to a felony, either at common law or by virtue of that act, knowing the same to have been feloniously stolen, taken, or embezzled, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for



a substantive felony, and shall be liable, on conviction, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three, or to be imprisoned for any term not exceeding two years. The prisoner could not have been indicted under that statute *per se* for feloniously receiving, for the taking of the goods by Martin, the partner of Morton, was not a felony. But then came the 31 & 32 Vict. c. 116, s. 1, which enacted that if anyone, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, &c., or other property, shall steal or embezzle any such money, goods, &c., or other property, he shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been, or was not, a member of such co-partnership or one of such beneficial owners. In *Reg. v. Talbot* (*Law Times*, vol. xlviii., p. 494) there is a dictum of Martin, B., reported, which bears upon this point. The prisoner was indicted for stealing a horse, which was alleged to belong to A. and B.; and, according to the case for the prosecution, the prisoner was intrusted with the horse to take to P.'s, but instead of taking it to P.'s he sold it, and appropriated the proceeds to his own use. The prisoner's defence was that he was a partner with A. and B., in the ownership of the horse; and Martin, B., said: "If the prisoner's defence is true, he must be acquitted. The case does not come within the 31 & 32 Vict. c. 116. That statute applies to the case of a large trading co-partnership or society, and not to the joint ownership of two or three persons of a particular chattel." The offence of feloniously receiving goods is not a common law offence, but a statutable one. [BYLES, J.—Is not a receiver an accessory after the fact at common law?] In the case now before the Court, Martin, the principal, was not guilty of any offence at common law; his offence is created by the recent statute. The 31 & 32 Vict. c. 116, s. 1, does not say that the fraudulent partner shall be guilty of felony, but that he shall be liable to be tried, convicted, and punished as if he had not been, or was not, a member of such co-partnership or one of such beneficial owners. The 31 & 32 Vict. c. 116, is not incorporated into the 24 & 25 Vict. c. 96.

*Campbell Foster* for the prosecution.—The conviction was right. The prisoner was an accessory after the fact to the stealing by Martin, and by the 24 & 25 Vict. c. 94, s. 3, it is enacted that whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice. In the present case the prisoner was indicted for the substantive felony of receiving. The object of the 31 & 32 Vict. c. 116, was to

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take away the immunity of partners from punishment previously existing for fraudulently disposing of partnership property. Now, a partner may be dealt with in this respect as a stranger. Moreover, Martin, the principal, was a fraudulent bailee within the meaning of sect. 3 of 24 & 25 Vict. c. 96, of his partner's share. Although the 31 & 32 Vict. c. 116, created a new felony, still the 24 & 25 Vict. c. 96, being *in pari materia* applies to it: (Dwarris on Statutes, 634-5.)

Waddy, in reply, cited *Rex v. Hardy* (6 T. R. 286).

*Cur. adv. vult.*

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May 4.

WILLES, J., now delivered the judgment of the Court.—The prisoner was convicted for feloniously receiving stolen goods, knowing them to have been stolen *contra formam statuti*, &c. There was no count charging the prisoner as accessory before or after the fact. The statement of facts shows evidence of a receipt of goods, stolen by one partner of the firm, with knowledge of their being so stolen. It further states facts, which might perhaps have been relied upon to sustain a charge of being simply accessory to the felony, if the indictment had contained a count to that effect. We must, however, deal with the only question raised, viz., whether the conviction upon the special charge of feloniously receiving stolen goods can be sustained. The 91st section of 24 & 25 Vict. c. 96, creates the felony charged in these terms, "whosoever shall receive any chattel, &c., the stealing, &c., whereof shall amount to a felony, either at common law or by virtue of this act, knowing the same to have been feloniously stolen, &c., shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and shall be liable at the discretion of the Court" to a maximum sentence of fourteen years' penal servitude. At the time that act (24 & 25 Vict. c. 96) was passed, theft by a partner of the goods of the firm did not fall within the criminal law either common or statute. This defect was supplied by 31 & 32 Vict. c. 116, which, after reciting that it is "expedient to provide for the better security of the property of co-partnerships and other joint beneficial owners against offences by part owners thereof, and further to amend the law as to embezzlement," proceeds to enact, by the 1st section, that if a partner or one of two or more beneficial owners shall steal, &c., any property of such copartnership or such joint beneficial owners, "every such person shall be liable to be dealt with, tried, convicted, and punished for the same, as if such person had not been or was not a member of such copartnership or one of such beneficial owners." This enactment is therefore limited in words to the fraudulent partner, and does not directly extend to third persons who deal with the property though in collusion with such partner.

In order to reach such persons either the law as to accessories must be resorted to, or it must be shown that the 24 & 25 Vict. c. 96, s. 91, is extended by implication to and to be read as incorporated in the 31 & 32 Vict. c. 116. As to the law of accessories, we do not suggest any doubt that if a statute creates a felony or a misdemeanor it by implication forbids counselling, aiding, or abetting the offence. This is now provided for in language strongly contrasting with that of 24 & 25 Vict. c. 96, s. 91, as to felony, by 24 & 25 Vict. c. 94, s. 1, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon. The case of accessories after the fact is provided for in like prospective terms by sect. 3. Also as to misdemeanors by sect. 8, "whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by any act passed or to be passed, shall be liable to be tried, &c., as a principal offender." And apart from these enactments, the common law would have supplied a remedy, though without the statutory facilities of procedure. As already pointed out, however, the conviction of the prisoner is not as of a simple accessory, whether before or after the fact, and it cannot be sustained upon that footing. The question, therefore, depends upon whether the 24 & 25 Vict. c. 96, s. 91, is extended, by inference or implication, to the present case. If not, the conviction was wrong, because at common law receivers of stolen goods, unless they likewise received and harboured the thief, were guilty of a bare misdemeanor, for which they were liable to fine and imprisonment (Foster's Crown Law, 373), and there could not be a conviction for a misdemeanor upon the present indictment for felony. The subject of extending statutes by inference to include cases not originally contemplated is one which has given rise to several decisions, the leading characteristic of which is that the earlier statute deals with a genus, within which a new species is brought by a subsequent act. Thus *choses in action* were not originally within the 13 Eliz. c. 5, against fraudulent conveyances, that statute being applicable only to property which could be taken in execution (*Sims v. Thomas*, 12 A. & E. 530); but, as to *choses in action* made subject to execution by 1 & 2 Vict. c. 110, there can be no doubt that by the conjoint operation of that act and the 13 Eliz. c. 5, such *choses in action* having become, by new enactments, a species of the *genus* property subject to execution, and, without any express enactment to that effect in the later statute, become subject to the operation of the former act: (*Norcutt v. Dodd*, C. & P. 100; *Barrach v. McCullough*, 26 L. J. 100, Ch.). So that if the 24 & 25 Vict. c. 96, s. 91, is to be read as a general enactment, that for the future any person receiving goods stolen with a

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guilty knowledge that they were stolen should be liable to be indicted for felony as a receiver, the subsequent statute having introduced a new species of larceny, it might have been contended that the general provision as to receiving in the former statute was by inference extended to the new species of larceny. There are, however, several difficulties in the way of arriving at that result upon the construction of 24 & 25 Vict. c. 96: First, the express words of sect. 91, "either at common law or by virtue of this act;" secondly, the fact that the statute as to simple accessories does expressly refer to acts *pari materiâ* to be passed; thirdly, the character of the extending enactment 31 & 32 Vict. c. 116, which deals not so much with property of a particular species as with a class of persons whom it specifies, and against whom only it is in terms directed, viz., partners and part owners, so that the effect is to create a new class of offenders; fourthly, the rule peculiarly applicable to the elaborate criminal legislation of which the statutes under consideration form a part, against extending penal enactments by construction. This latter rule may be illustrated by reference to the statute of 31 Eliz. c. 12, s. 5, which took away the benefit of clergy from an accessory in horse stealing, upon which it was held that the enactment extended only to such persons as were in judgment of law accessories at the time the act was made, namely, accessories at common law, and not to such as are made accessories by subsequent statutes; and therefore a person knowingly receiving a stolen horse, though made an accessory by subsequent statutes, was held not to be ousted of the benefit of clergy by the statute of Elizabeth: (Foster, 372.) Upon these grounds we think the statute (24 & 25 Vict. c. 96, s. 91) cannot be extended by construction so as to include a receiver of property stolen by a partner, so as to make such receiver liable, in the discretion of the Court, to the graver punishment of fourteen years' penal servitude thereby imposed, as the prisoner would be if this conviction was sustained, a circumstance which makes the authority cited from Foster especially applicable. The conviction must therefore be quashed.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*May 7, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. ELIZABETH BROWN. (a)

*Concealment of birth—What is—24 & 25 Vict. c. 100, s. 60.*

*What is a secret disposition of the dead body of a child within the meaning of 24 & 25 Vict. c. 100, s. 60, is a question for the jury, depending on the circumstances of the particular case.*

*Where the dead body of a child was thrown into a field, over a wall, 4½ ft. high, separating the yard of a public-house from the field, and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held that this was evidence from which the jury might infer a secret disposition of the body.*

CASE reserved for the opinion of this Court by Mr. Justice Brett.

The prisoner, Elizabeth Brown, was tried and convicted before me at Newcastle, at the last spring Assizes for the county of Northumberland, for endeavouring to conceal the birth of her child by secretly disposing of the dead body thereof.

The evidence as to the disposition of the body was a statement by the prisoner that she had put the body over a wall near which it was found; and statements before the jury by witnesses that the wall was 4½ ft. high, dividing a yard from a field; that the yard was at the back of a public-house, used for the convenience of that house and three other tenements by the occupiers thereof; that there was no thoroughfare into or through the yard, and no other entrance to it than by a narrow passage from the street; that the prisoner, who did not live at the public-house or at any of the tenements, must have passed from the street into the yard in order to throw the body over the wall into the field; that a person looking over the wall from the yard would see the child, but persons going through or using it in the ordinary way would

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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not see the child, the wall would hide the child from such persons; that the field in which the body was found was a grass field, used by a butcher to graze cattle; that it was a field with no gate into it from any road or from the public-house yard, but with a gate from the butcher's own yard; that there was no public path through the field; that there was no track or path in the field which would take any one within sight of the body; that no person going into the field in their ordinary occupation would go near the body or see it; that no one in the field would see it unless he went accidentally or on search up to the part of the wall where the body lay; that a little girl picking flowers in the field went accidentally to the wall and found the body; that it was close to the wall, as near to it as could possibly be. It seemed as if it had been thrown over the wall; there was blood on the wall; the body was lying on its face, at twenty yards from the gate, naked, with nothing on or over it, nothing to conceal it but its situation in the field and the wall.

Upon this evidence, it was contended, on behalf of the prisoner, that there was no evidence of a secret disposition of the dead body, and the case of *Reg. v. Nixon* (4 F. & F. 1040) was cited.

I left, upon this part of the case, the following question to the jury: Did the wall and the position of the child in the field, and with regard to the wall and the mode in which the field and the yard were used, conceal the body from all the world, unless from a person who, by searching for the child, might find it, or by going out of the way in the field or by looking over the wall might accidentally discover it? I told them that if they found an answer in the affirmative they might find that there was a secret disposition of the body, but that if they found an answer in the negative, they could not, in my opinion, find that there was a secret disposition. The jury found the prisoner guilty.

I desire the judgment of the Court of Criminal Appeal upon two points, first, whether there was any evidence of a secret disposition of the dead body of the child within the meaning of the statute; and, secondly, whether, if there was such evidence, the form in which the question was left to the jury was wrong in law.

If the Court should be of opinion that there was no evidence, or that the form of the question was wrong, then the conviction to be quashed; but if the Court should be of opinion that there was evidence, and that the form of the question was not wrong, then the conviction to stand.

WM. BALIOL BRETT.

No counsel appeared for the prisoner.

*Ridley* for the prosecution.—The question is whether there was any secret disposition of the body of the child. The case of *Reg. v. Nixon* was one where the prisoner was seen to remove the body out of the house, and it was afterwards found in the penfold or pond, 150yds. off, an open place (though locked), surrounded



with a wall 5ft. high on the outside, and along which was a public pathway, so that anyone who passed could look over and see it. In that case the probability was that people passing along the footway would find the body; here the circumstances are such that probably no one would find the body. In *Reg. v. Clarke* (4 F. & F. 1040) it was held to be a question for the judge whether there has been a secret disposing of the body, *i.e.*, a disposing of it in such a place as that the offence may have been committed, but it is for the jury to say whether there has been such a disposing of the body by the prisoner. In the old statute, 9 Geo. 4, c. 31, s. 14, the words were "by secret burying or otherwise disposing of the dead body of the child;" but in the present act, the 24 & 25 Vict. c. 100, s. 60, the words are "every person who shall by any secret disposition of the dead body of the child;" the change is material. In *Reg. v. Sleap* (9 Cox Crim. Cas. 559) the words of the 24 & 25 Vict. c. 100, s. 60, were held to mean the putting the body of the dead child in a place where it is not likely to be found; but merely placing it in an open box in a bedroom, and afterwards, on inquiry by the medical man, informing him that the body was in the box, was held not a secret disposition within the statute. In *Reg. v. Eliza Cook* (22 L. T. Rep. N.S. 216), it was held that, though the placing the dead body of the child in an unlocked box is not of itself sufficient evidence of concealment of birth, yet all the attendant circumstances must be considered, in order to determine whether or not the offence has been committed within the 24 & 25 Vict. c. 100, s. 60.

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v.  
BROWN.

1870.

Concealment of  
birth.

BOVILL, C.J.—The first question is, whether there was any evidence of the secret disposition of the dead body of the child within the meaning of the statute. Now, what is a secret disposition of the dead body depends upon the circumstances of each case. One may conceive of such a disposition where the circumstances might also amount to a public exposure, as placing the body in the middle of a large moor in winter, or on the top of a high mountain where persons are not likely to go. It is for the jury in each case to say what amounts to a secret disposition of the body. In the present case there was abundant evidence of a secret disposition of the body, for the body was put over a wall, near which it was found, and the wall might conceal the body, and whether it did so was a question for the jury. A woman might throw the dead body of a child over a cliff on to the sea-shore, and if the shore was frequented by persons at the spot, the act might not amount to a secret disposition of the body; but if it was unfrequented, then it might amount to a secret disposition. The only other question is as to the direction of the learned judge to the jury, and we think that that was correct, and that the conviction ought to stand.

The rest of the COURT concurring,

*Conviction affirmed.*

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v.  
DAY AND COX.  
—  
1870.  
—  
*Practice—  
Indictment—  
Abandoning  
counts.*

course had been adopted, it can scarcely be considered that the prisoner had a full opportunity afforded to him of presenting his entire defence to the jury. There is this further difficulty. The jury have found the prisoner guilty of night poaching and a common assault, and it would also appear on the record that he was acquitted of a common assault. We therefore think the conviction ought not to stand. It is unnecessary to say whether the prisoner might or might not be convicted of a common assault upon the first count.

WILLES, J.—The decision proceeds only on the ground of the course adopted at the trial in electing to abandon the charge of common assault. As to the question whether the prisoner could properly be convicted of a common assault upon the first count, I think that he could not. The abandoning the count for common assault was calculated to throw the prisoner off his guard, and prevent him being fully heard against it.

BYLES, J.—I also agree that the conviction cannot be sustained, on the grounds stated by my learned brothers.

HANNEN, J.—The counsel for the prosecution having deliberately abandoned the count for common assault, I think this conviction ought not to stand.

CLEASBY, B., concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*April 30 and May 4, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. JESSE SMITH.(a)

*Feloniously receiving—Partners—24 & 25 Vict. c. 96, s. 91, and  
31 & 32 Vict. c. 116, s. 1.*

*A partner stole goods belonging to the firm, and rendered himself  
liable to be dealt with as a felon under the 31 & 32 Vict. c. 116,  
s. 1, and sold the same to the prisoner, who knew of their having  
been stolen.*

*Held, that the prisoner could not be convicted on an indictment for  
feloniously receiving under the 24 & 25 Vict. c. 96, s. 91, but  
might have been convicted as an accessory after the fact under the  
24 & 25 Vict. c. 94, s. 3, on an indictment properly framed.*

CASE reserved for the opinion of this Court by Arthur  
R. Adams, Esq., sitting as Commissioner at the Spring  
Assizes, 1870, on the Midland Circuit.

Jesse Smith was indicted for receiving certain goods, the  
property of George Morton and another, knowing the same  
to have been feloniously stolen, and was tried before me at the  
last Assizes for the West Riding of Yorkshire, at Leeds.

The facts of the case were as follows :

George Morton was in partnership with one R. F. Martin, at  
Leeds, and carried on business in that town as ironmongers  
under the firm of R. F. Martin and Co. The goods sold there  
were principally supplied by William Morton, of Birmingham,  
trading under the firm of Haines and Morton.

In consequence of certain rumours as to the solvency of his  
firm, George Morton came to Leeds on the 13th of December,  
1869, and made arrangements with his partner, R. F. Martin, to  
secure the debt due to Haines and Morton, by giving a bill of sale,  
of the goods then in the shop, and whilst this document was being,  
prepared George Morton left Leeds and went to Sheffield.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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SMITH.  
—  
1870.  
—  
Receiving—  
Partners.

During his absence, his partner, R. F. Martin had interviews with the prisoner, and before the return of George Morton shut (the 14th of December) up the shop, and in the evening of the following day (the 15th of December) he hired drays, and in the presence of the prisoner conveyed the whole of the goods to the house of the prisoner, who apparently paid 100*l.* for them to R. F. Martin. The goods were proved to be worth considerably more than 300*l.*

From conversations with William Morton, the father of George Morton, it was evident that the prisoner was aware of the intended bill of sale, and that R. F. Martin was disposing of these goods in fraud of his partner, and to prevent the operation of the bill of sale.

It was objected on the part of the prisoner, that even if it were proved that R. F. Martin had committed an act of felony against his partner under the provisions of 31 & 32 Vict. c. 116, s. 1, and that he had been guilty of larceny of the partnership goods, yet that the prisoner could not be indicted for receiving such goods, knowing them to be stolen, as that statute had not made such receiving a felony, and that under the provisions of the Larceny Consolidation Act (24 & 25 Vict. c. 96, s. 91), only persons who received goods, the stealing of which amounted to a felony either at common law or under the provisions of that act, could be indicted as receivers; and as the stealing by a partner was not a larceny at common law, nor under the provisions of the Consolidation Act, no receiver of such goods could be indicted for a felony.

As this was the first case that had occurred since the passing of the act 31 & 32 Vict. c. 116, and thinking it more prudent that a point of such importance should be decided by a court of appeal, I declined to stop the case.

The jury finally found the prisoner guilty of receiving the goods, knowing them to be stolen, and I released the prisoner on good bail to appear at the next assizes if necessary.

I have now to request the opinion of the Justices of either Bench and the Barons of the Exchequer, whether this prisoner has been properly convicted.

ARTHUR R. ADAMS,  
Commissioner of Assize on the  
Midland Circuit.

*Waddy* for the prisoner.—It is submitted that this conviction cannot be sustained. The point arises on the construction of the stats. 24 & 25 Vict. c. 96, s. 91, and the 31 & 32 Vict. c. 116, s. 1. The former statute enacts that whosoever shall receive any chattel, money, &c., or other property, the stealing, taking, or embezzling whereof shall amount to a felony, either at common law or by virtue of that act, knowing the same to have been feloniously stolen, taken, or embezzled, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for

a substantive felony, and shall be liable, on conviction, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three, or to be imprisoned for any term not exceeding two years. The prisoner could not have been indicted under that statute *per se* for feloniously receiving, for the taking of the goods by Martin, the partner of Morton, was not a felony. But then came the 31 & 32 Vict. c. 116, s. 1, which enacted that if anyone, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, &c., or other property, shall steal or embezzle any such money, goods, &c., or other property, he shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been, or was not, a member of such co-partnership or one of such beneficial owners. In *Reg. v. Talbot* (*Law Times*, vol. xlviii., p. 494) there is a dictum of Martin, B., reported, which bears upon this point. The prisoner was indicted for stealing a horse, which was alleged to belong to A. and B.; and, according to the case for the prosecution, the prisoner was intrusted with the horse to take to P.'s, but instead of taking it to P.'s he sold it, and appropriated the proceeds to his own use. The prisoner's defence was that he was a partner with A. and B., in the ownership of the horse; and Martin, B., said: "If the prisoner's defence is true, he must be acquitted. The case does not come within the 31 & 32 Vict. c. 116. That statute applies to the case of a large trading co-partnership or society, and not to the joint ownership of two or three persons of a particular chattel." The offence of feloniously receiving goods is not a common law offence, but a statutable one. [BYLES, J.—Is not a receiver an accessory after the fact at common law?] In the case now before the Court, Martin, the principal, was not guilty of any offence at common law; his offence is created by the recent statute. The 31 & 32 Vict. c. 116, s. 1, does not say that the fraudulent partner shall be guilty of felony, but that he shall be liable to be tried, convicted, and punished as if he had not been, or was not, a member of such co-partnership or one of such beneficial owners. The 31 & 32 Vict. c. 116, is not incorporated into the 24 & 25 Vict. c. 96.

*Campbell Foster* for the prosecution.—The conviction was right. The prisoner was an accessory after the fact to the stealing by Martin, and by the 24 & 25 Vict. c. 94, s. 3, it is enacted that whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice. In the present case the prisoner was indicted for the substantive felony of receiving. The object of the 31 & 32 Vict. c. 116, was to

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v.  
SMITH.

1870.

Receiving—  
Partners.

REG.

v.

KAY.

1870.

—  
*Forgery—*  
*Warrant or*  
*order.*

William Kay was indicted for feloniously making by procuration, in the name of one Susey Ambler, a security for money, to wit 417*l.* 13*s.*, without lawful authority or excuse, with intent to defraud.

In the second count he was charged as in the first count, except that it was stated that he made the security without the lawful authority of the said Susey Ambler.

The third and fourth counts were as the first and second, except that the document was described as a "warrant."

The fifth and sixth counts were as the first and second, but the document was described as an "order."

The seventh and eighth counts were also as the first and second, but the document was described as an "authority for the payment of money."

The ninth and tenth counts were also as the first and second, but the document was described as a "request for the payment of money."

In ten other counts the prisoner was charged with feloniously signing by procuration like documents as in the other counts *mutatis mutandis*, and was tried before me at the last Assizes for the West Riding of Yorkshire, at Leeds.

The document forming the subject of the indictment, was in the following form :

"Thornton, Oct. 1867.

"Received of the South Lancashire Building Society the sum of 417*l.* 13*s.* on account of my share, No. 8071.

"417*l.* 13*s.*"

pp.      "SUSEY AMBLER.  
              "WM. KAY.

The prisoner was the local agent at Thornton of a society called "The South Lancashire Permanent Building Society," the head office of which was at Manchester. The society carried on a large business, and was in the habit of taking money on deposit for fixed periods at various rates of interest, but, if circumstances were favourable and the funds of the society flourishing, no objection was made to repay money lent on deposit at a date earlier than that originally agreed on, if the depositor gave one month's notice of an intention to withdraw the whole or a part of a deposit.

Susey Ambler was a depositor in the society, and in August, 1866, she lent to the society through the prisoner 460*l.* for two years at interest, and received from the prisoner a deposit note for that sum signed by him as agent. In August, 1868, the prisoner informed Mrs. Ambler that the sum of 41*l.* 8*s.* was due to her as interest on her loan of 460*l.* She, however, told him that he was to pay her the 1*l.* 8*s.*, and put the balance, 40*l.*, to her loan account. He then promised to do so, and obtained from her the receipt he had given her, and afterwards gave her an accountable receipt for 500*l.* at interest signed by him as agent for the society.



In October, 1867, the prisoner sent to the secretary of the society at Manchester the document on which the indictment was founded, and at the same time forwarded his monthly statement of accounts, in which he debited himself amongst other sums with 750*l.* received from the secretary, and credited himself amongst other payments with a payment to Susey Ambler (8071) of the sum of 417*l.* 13*s.*

The secretary of the society absconded in 1868 or 1869, and on examination of the accounts of the society a large deficit was discovered.

The present secretary, W. Wadsworth, was called as a witness for the prosecution, and he proved that if a depositor at a fixed date wished to withdraw the whole or any part of his deposit, a notice of one month was required by the society's rules, but he did not know whether or not that rule had not been frequently dispensed with; that it was the custom of the agents to write to the secretary at Manchester each month, sending in an account of the probable withdrawals of money for which the agent had, or ought to have had, notice; and that the secretary thereupon sent down to the agent sufficient funds for that purpose. He also proved that in the books of the society it appeared that the sum of 417*l.* 13*s.* had been paid in October, 1867, to Susey Ambler, and produced the receipt before mentioned. He stated that he had carefully searched through the documents, but could find no order for the payment of that sum signed by S. Ambler, or any document relating to that payment except the monthly account and the receipt; nor could he find any letter from the agent giving notice that Susey Ambler required a return of a portion of her deposit. He stated that receipts were required, and that it was the duty of the agents not to pay without receipts, and to forward the receipts to the office, when the sums would be properly entered in the books of the society.

He also proved that the prisoner was a director of the society in the years 1868 and 1869.

It was objected on the part of the prisoner that under the provisions of "The Forgery Consolidation Act" (24 & 25 Vict. c. 98, s. 24), this indictment must fail, for that the document produced was only a receipt for money paid, and that the word "receipt" was not to be found in that section. And that it was clear from the evidence that the money was paid to the prisoner by the secretary before the receipt was handed over to him.

I declined to stop the case, on the authority of *Reg. v. Raake* (2 Moody Cr. Cas. Res. 126), *Reg. v. Illige* (1 Den. Cr. Cas. Res. 404; 3 Cox Crim. Cas. 552), and *Reg. v. Pulbrook* (9 C. & P. 37); and intimated to the counsel for the prisoner that, if the jury were of opinion that by the custom of the society a document like that produced was treated as an authority or request to pay money, I was of opinion that the indictment was good.

The counsel for the prisoner thereupon addressed the jury,

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KAY.  
—  
1870.  
—  
Forgery—  
Warrant or  
order.

REG.  
v.  
KAY.  
—  
1870.  
—  
*Forgery—  
Warrant or  
order.*

contending that there was nothing proved which could justify them in saying that the society had ever treated such documents as any thing else than simple receipts for money previously paid.

I then summed up the case, and told the jury that if they were of opinion, from the whole of the facts proved, that the society had recognised such a document as an order, or as an authority, or as a request to pay money, they should find the prisoner guilty, and that they might take into their consideration the fact that in this case no order or authority or request from Susey Ambler, or pretending to be signed by her, had been discovered amongst the papers of the society.

The jury returned a verdict of guilty, saying that by the custom of the society such documents were treated as an "authority to pay," and as a "warrant to pay," and as a "request to pay money," but not as an "order."

I then directed a verdict of guilty on the counts, wherein the document was described as a "warrant," "authority," or "request," and discharged the prisoner, on good bail, to surrender and receive judgment at the next Assizes if necessary.

I have now to request the opinion of the Justices of either Bench and the Barons of the Exchequer.

Whether, under the circumstances proved at the trial, the document in question can be held to be a "warrant," or an "authority," or a "request to pay money."

ARTHUR R. ADAMS,  
Commissioner of Assize of the  
Midland Circuit.

No counsel appeared on either side to argue.

*Cur. adv. vult.*

BOVILL, C.J.—We are of opinion that the conviction in this case was right. The jury found that a document such as that in question was, by the custom of the society, treated as an authority to pay, as a warrant to pay, and as a request to pay money. We think there is no objection in law to its being so treated. In *Morrison's case* (Bell C. C. 158; 8 Cox Crim. Cas. 194) it was held, that a pawnbroker's ticket might be treated as a warrant for the delivery of goods. In *Allen v. The Sun Fire and Life Assurance Company* (9 C. B. 574) it was held, that a credit note, signed by the directors and addressed to the cashier of a company, might be declared upon as a promissory note of the company. And we think that the document in this case might properly be described as a warrant, an authority, or a request to pay money, and that the conviction must be affirmed.

*Conviction affirmed.*

## HOME CIRCUIT.

SURREY SPRING ASSIZES, 1869.

(Before Baron BRAMWELL.)

DARLING *v.* COOPER; BEAUCHAMP *v.* THE SAME. (a)

*False imprisonment and malicious prosecution—Reasonable cause  
—Evidence of malice.*

*A farmer, having lost two trusses of straw, and finding the plaintiffs soon afterwards at a place some two or three miles distant with some loose straw in a cart, gave them into custody, with some expression of irritation, and prosecuted them for stealing it:*

*Held, that if the straw were of the same kind as that lost, and in particular if it were clean and new, there was probable cause for suspicion; but, if otherwise, there was not probable cause; and if the jury thought that the defendant had acted under irritation, rashly, and rather through the influence of angry feeling than with reasonable care or due inquiry, there was evidence of malice on a count for malicious prosecution.*

THESE were two actions for false imprisonment and malicious prosecution arising out of the same transaction, and tried by consent together. The defendant was a farmer at Egham, and had lost two trusses of straw. Shortly afterwards, he was told that two men (the plaintiffs) were then going towards Brentford in a cart with clean wheat straw in it. He pursued and overtook them, and finding in the cart some loose straw, he gave them into custody at Brentford for stealing it, and they were locked up and brought before the magistrate, when, through some mistake, he did not attend, and they were discharged. He was proved to have said that he would spend what the straw cost in prosecuting them, and he went before the magistrate and procured a warrant against them, in Surrey, upon which they were again arrested and prosecuted and sent to trial, when they were acquitted. They then brought these actions without notice.

There was contradictory evidence as to the weight, worth, and condition of the straw found in the plaintiffs' cart. According to

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

DARLING  
v.  
COOPER;  
BEAUCHAMP

v.  
THE SAME.

1869.

*Malicious  
prosecution—  
Evidence of  
Larceny.*

their account, it was loose refuse straw ordinarily taken from farmyards. According to the defendant's evidence, it was 50lb. of clean, new straw.

It did not appear upon the plaintiffs' evidence that they had said where they got the straw; but they gave the same account to the defendant at the time, and it was confirmed by the police.

*Thesiger* objected, first, that there was a misjoinder of action, or a mistrial, the first imprisonment having taken place in Middlesex, and the second in Surrey, and both being local; secondly, that there was no evidence of malice; thirdly, that there ought to have been notice of action.

BRAMWELL, B., however, declined to stop the case.

At the close of the case,

BRAMWELL, B., said it belonged to a class of cases which were of some importance, because, as there was no regular public prosecutor in this country, and criminal prosecutions were ordinarily in the hands of private persons, it was important that the protection which, on that account, the law threw around private prosecutors should be maintained and upheld. The public are greatly interested in prosecutors being protected, so long as they honestly intend only to pursue the law, and act upon reasonable grounds. In the present instance, as regarded the justification for the arrest, the defendant had acted hastily, at his own peril, in giving the plaintiffs into custody on the charge of stealing, without any reasonable inquiry and with nothing beyond the mere fact of finding straw in their possession. The defendant might have been honestly satisfied that the straw was his; but a man has no right to be satisfied in such a case when he might make further inquiry. As regarded the maintenance of the action, he could not put the question better than in the words of Williams, J.: "Did the defendant honestly and reasonably believe in the existence of those facts which, if they had existed, would have afforded a justification?" As regarded the count for malicious prosecution, he told them, as matter of law, that if they were satisfied the defendant reasonably believed that two trusses of straw had been stolen from him, and that he very soon afterwards found in the plaintiffs' cart such straw as he had lost, there would be reasonable cause for the prosecution, and therefore, in that view of the case, the action would not be maintainable on that count. Whether that were so or not would mainly depend upon the view the jury might take of the facts, and especially as to whether or not the straw was clean and new. If so, then there would be a reasonable cause for the prosecution, and the count in that view failed. If otherwise, then arose the question of malice, and even though there was no reasonable cause for the prosecution, still the action would not be maintainable unless the prosecution was also malicious. It will not be enough that it appears that the prosecutor was in the wrong; it must appear that he was maliciously so, that is, obstinately and improperly in the wrong, through anger, ill-feeling, or

any bad motive or feeling, differing from a mere honest desire to put the law in force. There is some evidence of the existence of anger on the part of the prosecutor. It is for the jury to say (if they disbelieve his evidence) whether it amounts to evidence of an improper motive. If the prosecutor acted honestly, without any bad motive, and also had a reasonable belief on which he acted, then he is entitled to the verdict, for the law does not allow a private prosecutor to be made liable merely on account of a mistake or error in judgment; nor unless he acted maliciously or without reasonable cause. And as there has been no notice of action, the question arises substantially upon the whole case, did the defendant act honestly and reasonably?

DARLING  
v.  
COOPER;  
BEAUCHAMP  
v.  
THE SAME.  
—  
1869.  
—  
*Malicious  
prosecution—  
Evidence of  
Larceny.*

*Verdict for the plaintiff in each case—damages 25l.(a)*

## OXFORD CIRCUIT.

STAFFORDSHIRE LENT ASSIZES, 1870.

(Before Mr. Justice LUSH.)

REG. v. JOHN STONE THOMAS.(b)

*Misdemeanor under the Debtors Act, 1869 (32 & 33 Vict. c. 62),  
s. 11, sub-sect. 15—Evidence—Costs.*

*By the Debtors Act, 1869, s. 11, it is enacted that “any person adjudged bankrupt . . . . shall . . . . be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour, if (sub-sect. 15) within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he has no intent to defraud.”*

*A grocer obtained goods of his trade upon credit. Soon after receiving them, and before they were paid for, he executed a bill of sale in favour of his sister who lived with him. This bill of sale, which was given in consideration of a debt owing from him to his sister, passed away all his stock-in-trade and effects whatsoever, including the above-mentioned unpaid-for goods.*

(a) *The* *siger* obtained a rule for a new trial as against evidence, but the cases were compromised.

(b) Reported by JOHN ROSE, Esq., Barrister-at Law.

REG.  
v.  
THOMAS.  
—  
1870.  
—  
Bankruptcy—  
Evidence—  
Costs.

*Having been made bankrupt, he was indicted for misdemeanor under the foregoing section of the Debtors Act, 1869:*

*Held, that the production of the adjudication under the seal of the court was sufficient evidence of the bankruptcy. That disposing of the goods by bill of sale was not disposing of them in the "ordinary way of trade;" and, therefore, that as property which the prisoner had obtained on credit, and had not paid for, had passed by the bill of sale, he came within the section, unless he had no intent to defraud. But that assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud.*

*Where the prosecution of a bankrupt under the Debtors Act, 1869, is not ordered by any Court, the judge at the trial has no power to allow the costs of the prosecution.*

THE prisoner was indicted for misdemeanor, under 32 & 33 Vict. c. 62 (the Debtors Act, 1869), ss. 11 and 13.

The indictment alleged that on the 28th of February, 1870, a petition in bankruptcy was presented, and on the 9th of March, 1870, John Stone Thomas (the prisoner) was adjudicated a bankrupt in due form of law.

It contained six counts. The first and second counts were framed upon sub-sect. 14 of sect. 11 of the Debtors Act, 1869.

The third count, framed upon sub-sect. 15 of sect. 11, charged that the said John Stone Thomas, within four months next before the presentation of such petition, to wit, on the 19th of February, in the year aforesaid, being then a trader, unlawfully did dispose of, otherwise than in the ordinary way of his trade, to wit, by making and executing a certain bill of sale to one Anne Elizabeth Thomas, certain property which he, the said John Stone Thomas, had obtained on credit, to wit, one bag of Indian meal, and one bag of oatmeal, obtained on credit from William Vernon, and two bags of sharps obtained on credit from Thomas Walker and Henry Clarke, and that the said John Stone Thomas, at the time of disposing of the said last-mentioned property respectively, had not, and yet hath not, paid for the same or any part thereof. Against, &c.

The fourth and fifth counts were framed upon sub-sect. 1 of sect. 13, and the sixth count upon sub-sect. 2 of sect. 13.

*Bosanquet* for the prosecution.

*Motteram* for the defence.

The accused was a grocer at Cheadle. His sister, Miss Anne Elizabeth Thomas, lived with him, and on the 19th of February, 1870, he executed in her favour a bill of sale.

By this instrument—which commenced with a recital to the effect that the accused was indebted to Miss Thomas in the sum of 430*l.* moneys lent—he assigned to her all his stock-in-trade, fixtures, furniture, book debts, and effects whatsoever, in consideration of the sum of 5*l.*

On the 21st of February he gave directions that all the property



should be sold, and bills were posted in Cheadle on the night of the 23rd of February, stating that the sale by auction would take place on the 25th, 26th, and 28th of February.

On the 22nd of February Vernon, a creditor, went to the shop of the accused, found the shutters up and the door fastened, and could not gain admission.

On the 24th of February a warrant was issued for the apprehension of the accused, but he had absconded, and the officer was unable to execute it for some time. Miss Thomas remained on the premises in possession.

For the prosecution, Charles H. Adams, clerk to the registrar of the County Court at Stoke-upon-Trent, was called, and produced the petition in bankruptcy by Messrs. Walker and Clarke against the accused, dated the 28th of February, 1870, and the adjudication dated the 9th of March, 1870.

William Vernon, miller, said he was a creditor of the accused, who owed him 53*l.* 3*s.* That sum was owing on the 19th of February. The last goods he sent in consisted of a bag of beans, ordered by the accused on the 15th of February, and delivered to him on the 16th. They were sent in on a month's credit. Five bags of flour and three of bran were also ordered in addition to the beans, but were not delivered. On the 22nd he went to the shop; it was closed, the shutters up, and the door fastened; he could not gain admission. On the 24th he saw posters and hand-bills (produced) on the walls announcing a sale of the whole of the furniture, stock-in-trade, fixtures, and all other effects on the premises of Mr. Thomas, grocer, Cheadle, on the 25th, 26th, and 28th of February, under a bill of sale. On the 25th witness went to the premises, and there saw two of his sacks, containing oat-meal and Indian meal. These sacks of meal were mentioned in the sale catalogue.

Henry Clarke, of the firm of Walker and Clarke, creditors to the amount of 106*l.* 11*s.* 6*d.* for goods sold and delivered up to the 19th of February to the accused, said that they had their last order for ten bags of flour, &c., on the 11th of February, but only partially executed it; that was the largest order they had received from the accused. Witness also stated that on viewing the lots prepared for sale he found amongst them two bags of sharps which he had delivered and for which his firm had not been paid.

James Nixon said 34*l.* 13*s.* 6*d.* was due to him for goods sold and delivered to the accused up to the 19th of February.

William Keates, printer, said that he got out the posters announcing the sale by the direction of the auctioneer and the accused.

The bill-sticker said he was told by the auctioneer not to post the bills in Cheadle until after dark.

The bill of sale was put in and read.

A police officer proved that he received a warrant on the 24th of February, and searched for the prisoner, but could not find him, but apprehended him on the 28th of February.

RES.  
v.  
THOMAS.

1870.

Bankruptcy—  
Evidence—  
Costs.

REG.  
v.  
THOMAS.  
—  
1870.  
—  
*Bankruptcy—  
Evidence—  
Costs.*

At the close of the case for the prosecution, *Motteram* submitted that the bankruptcy of the prisoner had not been proved, the counsel for the prosecution having merely put in the adjudication under the seal of the court. Sect. 10 of the Bankruptcy Act, 1869, enacts that “a copy of an order of the Court adjudging the debtor to be a bankrupt shall be published in the *London Gazette*, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this act, and the production of a copy of the *Gazette* containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt and of the date of the adjudication.”

LUSH, J.—The production of the *London Gazette* is merely a compendious mode of proving the bankruptcy; but, if the *London Gazette* is not produced, the bankruptcy may be proved *aliunde*. Here the prosecutor need not prove the acts of bankruptcy. Sect. 11 of the Debtors Act, 1869, commences thus—“any person *adjudged* bankrupt.” The provision as to the *Gazette* is merely cumulative, and the bankruptcy may be proved by the *Gazette* or otherwise.

*Motteram*.—Then I would ask your Lordship if there is any case to go to the jury?

LUSH, J.—Yes, I think so. The prisoner, having been in possession of considerable stock in trade, passed it all over to his sister.

*Motteram*, in addressing the jury for the defence, urged upon them that as the bill of sale had been given in pursuance of a long antecedent promise to execute it when requested, and was really in consideration of the advance of 430*l.*, the making of it was not fraudulent, and the prisoner could not be convicted under sub-sect. 15 of sect. 11; moreover, by far the larger portion of the goods obtained upon credit had been actually sold to different customers.

LUSH, J.—If those “sharps” mentioned in the third count of the indictment, and seen on the premises amongst the lots prepared for sale, formed part of goods not paid for, then the case falls within sub-sect. 15 of sect. 11, which declares it to be a misdemeanor if anyone, “being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud.” You cannot say that disposing of stock in trade by a bill of sale is disposing of it in the “ordinary way of trade;” that must be by selling over the counter.

*Motteram*.—It must follow, then, that no such security as a bill of sale can be safely given by a trader lest it may chance to include some articles not paid for. Assume the bill of sale to be *bonâ fide* and good, and that the creditor putting it in force takes away a portion of the goods delivered within a reasonable time of

credit, but before they are paid for, if your Lordship thinks that that would be a disposing of them not in the ordinary way of trade, then I have no case.

LUSH, J.—I am clear upon that point.

*Motteram*.—But the actual giving of the bill of sale must be taken to relate back to the promise to make it.

LUSH, J.—I don't think that signifies. He had no business to promise. The act says that you shall not get rid of, otherwise than in the ordinary way of your trade, any property you have not paid for. [The learned judge added, that as this was the first question which had arisen upon the construction of the section, he would take the opinion of Martin, B., upon it, and on returning into court after so doing, said:] My brother Martin has no doubt in this matter, that disposing by bill of sale is not disposing in the ordinary way of trade, and this being property which the prisoner had obtained on credit, and had not paid for, and which passed by the bill of sale, he is within the act, unless he had no intention to defraud. Now, if he passed away every stick of his property, book debts and all, how can it be said that the bill of sale was not made with intent to defraud? To defraud a creditor is to take away the means of paying him, and surely if all the property is given to one creditor, reserving nothing to the others, those others are defrauded.

*Motteram*.—If the attorney drawing the bill of sale had excluded these things that came in after the 17th of February, the prisoner would not have been within this clause.

LUSH, J.—No; not within this clause. [To the jury.] Upon the evidence already given you have no alternative but to find the prisoner guilty. This is a new statute, which makes it criminal to defraud creditors. [His Lordship read sub-sect. 15 of sect. 11.] It cannot be said that to give away the whole of one's property by a bill of sale is disposing of it in an ordinary way of trade. Now, part of these things, viz., two bags of "sharps," had not been paid for, and are within the very terms of the act. Are you satisfied that there was no intention to defraud? This bill of sale conveyed away everything the prisoner had; how can you say he had no intent to defraud? If he had such intent he is guilty of a misdemeanor within the act of Parliament, and you will find him guilty on the third count of the indictment.

*Verdict*—guilty; sentence, fourteen days' imprisonment.

*Bosanquet* asked that the costs of the prosecution might be allowed; but, as the prosecution had not been "ordered by any Court" within the terms of sect. 17, the learned judge said he had no power to allow them, either under that section or by the general act.

Attorney for the prosecution, *Blagg*, Cheadle.

Attorney for the prisoner, *Slaney*, Newcastle-under-Lyme.

REG.  
v.  
THOMAS.

1870.

Bankruptcy—  
Evidence—  
Costs.

## WESTERN CIRCUIT.

SOMERSET SPRING ASSIZES, 1870.

(Before Chief Baron KELLY.)

REG. v. BACON.(a)

*Perjury—Information under the 5 & 6 Will. 4, c. 50, s. 78, for furious riding—No penalty imposed by the section.*

*The prisoner was indicted for perjury committed by him as a witness on an information before justices against A. B. for furiously riding, contrary to sect. 78 of the 5 & 6 Will. 4, c. 50 (Highway Act):*

*Held, that, as that section gives the justices no jurisdiction to impose any penalty for furious riding, the prisoner did not commit the offence of perjury.*

THE prisoner was indicted for perjury committed before justices at petty sessions upon an information against A. B., under sect. 78 of the 5 & 6 Will. 4, c. 50 (Highway Act), for furiously riding. Upon the hearing of the said information, the prisoner was called as a witness for the then defendant to disprove the charge, and it was for perjury alleged to have been then committed by him that the present indictment was preferred.

T. W. Saunders, for the prisoner, at the close of the evidence for the prosecution, objected that there was no evidence to go to the jury, for that the offence charged in the information was not one upon which the justices at petty sessions had any power to adjudicate. The proceedings were taken under the 78th sect. of the 5 & 6 Will. 4, c. 50, which imposes penalties for various offences, and amongst others, as follows: "If any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously, so as to endanger the life or limb of any passenger, every person so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice, or by the oath of one or more credible witnesses before any two justices of the peace, shall, in

(a) Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding 5*l.*, in case such driver shall not be the owner of such waggon, cart, or other carriage; and in case the offender be the owner of such waggon, cart, or other carriage, then any sum not exceeding 10*l.*, and in either of the said cases shall, in default of payment, be committed," &c. Although the earlier part of the section refers to "any person riding any horse or beast," there is no penalty attached to *furiously riding*, the penalty being confined exclusively to persons "driving any sort of carriage," it being a sum not exceeding 5*l.* if the driver is not the owner, and not exceeding 10*l.* if he is the owner. The justices, therefore, had no power to adjudicate upon the charge upon which the evidence was given by the defendant, and so the evidence was given in a court *coram non judice*.

*Speke*, for the prosecution, contended that the justices had jurisdiction, which, in fact, was being constantly exercised; that the section, by referring to furiously driving, made it an offence with which the justices might deal.

KELLY, C.B.—It is quite clear that the act does not give the justices any power to inflict any punishment for furiously riding. The statute imposes a penalty only on those who furiously *drive*. This is, no doubt, a *casus omissus*, but it is not for me to supply the omission. There was, therefore, no legal perjury committed by the prisoner, and he must be acquitted.

*Verdict—not guilty.*

Attorney for the prosecution, *O. J. Simmons*.

Attorneys for the prisoner, *Reed and Cook*.

REG.  
v.  
BACON.  
—  
1870.

Perjury—  
Jurisdiction of  
justices.

## OXFORD CIRCUIT.

STAFFORDSHIRE LENT ASSIZES, 1870.

(Before Mr. Justice LUSH.)

REG. v. ELIZA COOK.(a)

*Concealment of birth—Evidence of.*

*Although the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of concealment of birth within 24 & 25 Vict. c. 100, s. 60, yet all the attendant circumstances of the case must be taken into consideration, in order to determine whether or not an offence under the above-mentioned section of the statute has been committed.*

**I**NDICTMENT for concealment of birth.

The prisoner was in domestic service as a cook. On the 18th of December she told a fellow-servant that she was suffering from toothache, and would go to bed. She did so, and remained in her room until the 20th of December, but did not lock the bedroom door. The housemaid observed that the prisoner had changed the sheets on her bed, and that those which she removed were stained.

On the morning of the 20th of December the prisoner was discharged by her master. The housemaid helped her to complete the packing of her box, which was already half filled when the housemaid went to it, but which was not locked. Having finished packing the box, the housemaid locked it, and gave the prisoner the key. The prisoner, with her box, was then sent home to her mother. A short time after her arrival at home the police went to the mother's house, and found the box in the parlour. The prisoner was requested to empty it. She removed some of its contents, and in doing so was seen to take out a bundle and throw it into the mouth of a flour sack behind the door. This bundle contained the dead body of a child.

*Motteram* for the prosecution.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.



*Young*, for the prisoner, contended that there was no evidence of concealment; that merely to abstain from immediately confessing the fact of a birth was not to conceal it. In *Reg. v. Sleep* (9 Cox Crim. Cas. 559), it was held that the endeavour to conceal the birth of a child by a secret disposition of the dead body within the meaning of the stat. 24 & 25 Vict. c. 100, s. 60, must be by putting it into some place where it is not likely to be found; and that placing it in an open box in the prisoner's bedroom, and afterwards, on inquiry by the medical man, informing him that the child was in the box, where it was found, is not a secret disposition within the statute. In the present case the box was left unlocked, and the housemaid had access to it. And in the recent case of *Reg. v. Jones*, tried at the Gloucester Summer Assizes, 1869, M. Smith, J., held that the placing of the dead body of a child in an unlocked box was not of itself sufficient evidence of concealment.

REG.  
v.  
COOK.  
—  
1870.

Concealment of  
birth.

LUSH, J.—That may be so; but then all the attendant circumstances of the case must be taken into consideration.

The learned Judge left the case to the jury, who found the prisoner guilty.

*Sentence, two months' imprisonment.*

Attorney for the prosecution, *Hand*, Stafford.

Attorney for the prisoner, *Sheldon*, Wednesbury.

## OXFORD CIRCUIT.

STAFFORDSHIRE LENT ASSIZES, 1870.

(Before Mr. Justice LUSH.)

REG. v. FREDERICK JONES.(a)

*Manslaughter—Contributory negligence by deceased.*

*If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge; and if by culpably negligent driving he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the horse, and thereby assisted in bringing about the accident.*

*Even if the doctrine of contributory negligence applies to criminal cases (as to which point—quære?) yet there is no contributory negligence on the part of anyone in merely getting into a vehicle and allowing himself to be driven, although the driver be perceptibly drunk.*

**I**NDICTMENT for manslaughter.

The prisoner drove the deceased (a friend) in a trap to some races. At the races the former became intoxicated, and when his trap was ready to take him and the deceased home, he made several ineffectual attempts to get into it before he succeeded in doing so. The deceased, noticing this, wished to take the reins, but the prisoner said he would drive his own horse, and added that he would drive him (meaning the deceased) “quicker than he was ever driven in his life.”

The prisoner whipped the horse and drove off at a furious rate, standing up and flogging the animal first on one side and then on the other. The trap was upset, and the deceased, being thrown out, received the injuries from the effect of which he died.

G. Browne, for the prosecution, opened the facts above set forth.

Young, for the prisoner, submitted that, upon the statement of

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

the counsel for the prosecution, there was no case. There had been contributory negligence on the part of the deceased. [LUSH, J.—That is not allowed as an excuse in a criminal case.] In *Reg. v. Birchall* (4 F. & F. 1087), Willes, J., held that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing that, until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. Now, in the present case Mr. Wedge, the deceased, had volunteered to get into the trap, although he knew what condition Jones was in, and by so doing contributed to his death by his own negligence.

REG.  
v.  
JONES.  
—  
1870.  
—  
*Manslaughter.*

LUSH, J.—The prisoner undertook to drive the deceased. He must drive carefully, must he not? And if he neglects that duty he is responsible. The case cited is quite at variance with what I have always heard laid down. I cannot see that there is any contributory negligence on the part of any one in merely getting into a trap and allowing himself to be driven.

The witnesses for the prosecution being then called, one of them, Mrs. Cooper, in giving evidence, said that just before the accident she saw the deceased put his hand out; but in her deposition before the coroner she was represented as having said that he put his hand out and caught hold of the rein. She now stated that she did not make that statement before the coroner, and she did not know why the deceased put his hand out.

LUSH, J., to the jury.—The question for you to consider is, whether the death of Mr. Wedge was caused by the culpable neglect of the prisoner. For my own part, I must say that I hold it to be a matter of law that a man who takes another man into a trap with the intention of driving him is bound to exercise reasonable care, both in regard to the safety of the man under his charge and also in regard to the safety of persons whom he may meet in the road. A man cannot claim any indulgence on account of being drunk. If you think the carriage was overturned by the prisoner's culpably negligent driving, and that caused the death of the deceased, you will find the prisoner guilty of manslaughter; but if, on the other hand, you have reason to believe that the deceased himself interfered with the management of the horse, you will acquit the prisoner.

*Guilty.*

## NORFOLK CIRCUIT.

BURY ST. EDMUNDS WINTER ASSIZES, 1869.

(Before Mr. Justice BLACKBURN.)

REG. v. WILLIAM HARVEY AND HENRY HARVEY.<sup>(a)</sup>*Forgery—Evidence—Comparison of handwriting—Imperfect cheque.*

*Upon an indictment for forging a cheque for 60l. 10s., evidence of the number of the notes in which it was paid was rejected in consequence of the original entry not being forthcoming at the trial, and, per Blackburn, J., that it was an unreasonable application to have the trial adjourned, to supply such a deficiency : Held, further, that copy books found at the prisoner's house containing writing by the prisoner, Henry Harvey, and produced by a policeman, could not be received in order to compare with the forged cheque, upon the authority of Reg. v. Wilbain (9 Cox Crim. Cas. 448, Irish), where it was held that policemen cannot give evidence as experts, and it was rejected, notwithstanding 28 Vict. c. 18, s. 8, no other expert being called.*

**I**NDICTMENT for forging and uttering a cheque.*Cherry* for the prosecution.*Sims Reeve* for the prisoner.

The facts of the case were shortly as follows: The prosecutors, Messrs. Alexander and Co., are bankers carrying on business at Ipswich, Woodbridge, &c., and the prisoners were brothers occupying the position of labourers. The indictment charged them with forging and uttering a certain cheque with intent to defraud. It appeared that on the 13th of October a person, supposed to be William Harvey, presented at the Woodbridge branch of the prosecutor's bank a cheque, of which the following is a copy. It was filled up on a form issued by the prosecutors.

"No.

"Kenton, Oct. 11, 1869.

"Alexander and Co. Ipswich.

"Pay Mr. Roe (or bearer)

"Sixty pounds ten shillings.

"60l. 10s.

"JON. SIMONS."

<sup>(a)</sup> Reported by J. W. COOPER, Esq., Barrister-at-Law.

When presented, the name of the drawer was indorsed John Simons, and the cashier pointed out that, not being payable to bearer, the word "bearer" being scratched out in pencil, it would require the name of Roe to be indorsed; the person who presented it thereupon stated his name was Roe, and indorsed it "Edgar Roe." The cheque was then cashed, and subsequently it turned out that the name of the drawer was fictitious, and Edgar Roe's signature a forgery. The cheque was cashed partly in notes payable at the prosecutor's bank at Woodbridge and the remainder in gold. The numbers of the notes were taken at the time the cheque was cashed, and it was sought by this means to bring the case home to William Harvey, who was shown to have changed two or three 5*l.* notes. The case against Henry Harvey rested on the evidence of some copy books found at his house, the handwriting in which, it was contended, corresponded with the writing on the cheque, and in addition he was shown to have changed one 5*l.* note.

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v.  
HARVEY.  
—  
1869.  
—  
*Forgery—  
Evidence.*

Mr. Alexander, the cashier at the Woodbridge bank, was called in support of the case for the prosecution, and was about to prove the number of the notes issued in exchange for the cheque from a written memorandum.

*Reeve* thereupon asked the witness whether he had made the memorandum at the time.

Mr. Alexander.—No, I entered them in a book kept for that purpose, and when the cheque was returned dishonoured I referred to the book and took the number of the notes from it.

*Reeve* objected to the evidence unless the original entry was produced.

BLACKBURN, J.—The memorandum is certainly not evidence. The book containing the original entry must be produced.

*Cherry* explained that it had been left behind inadvertently, and applied to have the trial postponed for its production.

BLACKBURN, J.—Its non-production will have a very material effect upon the case; but I think it unreasonable that the jury should be locked up until to-morrow morning. The trial must proceed.

The forged cheque was then put in and read.

*Reeve* objected that it was not a valid order for the payment of money.

BLACKBURN, J.—It is a most clumsily drawn instrument, but it is sufficient; it obtained the money and defrauded the prosecutors, and the fact of its being informal does not affect the subject of this indictment in the slightest degree.

A policeman, William Batten, produced some copy books found at the house of the prisoner Henry Harvey, which contained his handwriting corresponding to the writing on the cheque.

*Reeve* objected to this evidence. He cited *Reg. v. Wilbain* (9 Cox Crim. Cas. 448, Irish), where it was held that police officers and constables are not competent to give evidence as experts.

REG.  
v.  
HARVEY.

—  
1869.

—  
*Forgery—  
Evidence.*

BLACKBURN, J.—But the jury can inspect them and compare them with the forged document. But still they are only copy books, which go no further than to show that the prisoner was taught writing. I think the evidence is very weak, and I do not think the jury ought to act upon it without the assistance of an expert. The policeman is certainly not a skilled witness, and, according to *Reg. v. Wilbain*, not a competent one.

*Cherry* drew attention to 28 Vict. c. 18, s. 8, which enacts that “Comparison of a disputed writing, with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writing, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.”

BLACKBURN, J.—But here we have no expert, and I do not think it would be right to let the jury compare the handwriting without some such assistance. The evidence is very slight.

*Not guilty.*



## NORFOLK CIRCUIT.

BURY ST. EDMUNDS WINTER ASSIZES, 1869.

(Before Mr. Justice BLACKBURN.)

REG. v. WADE.(a)

*Larceny—Taking under claim of right—Question for the jury.*

*Upon an indictment for larceny, it appeared that the prisoner had been intrusted by the wife of the prosecutor to repair an umbrella. After the repairs were finished, and it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it :*

*Held that, if the jury were of opinion that the taking by the prisoner was an honest assertion of his right, they were to find him not guilty, but if it was only a colourable pretence to obtain possession, then to convict him.*

THE prisoner John Wade was charged with larceny under the following circumstances.

*Blofield* for the prosecution.

The prosecutor was a labouring man, and the prisoner a travelling umbrella mender ; and it appeared that on the 18th of November he accosted the wife of the prosecutor, asking her if she had any umbrellas to mend. She replied she had, and he said he would do it cheap—for two or three halfpence. Accordingly he repaired it, and when done demanded ninepence for his labour ; the umbrella had then been redelivered to the prosecutor's wife, who refused to pay the demand. The prisoner declined to take 2*d.*, which was offered to him, rushed up-stairs, where the umbrella had been deposited, and took it away with him.

In reply to the prisoner, the wife denied that he offered to restore the umbrella to its original condition.

The prisoner, in defence, stated that he had no intention of stealing it, but merely took it to secure being paid.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

REG.  
v.  
WADE.  
—  
1869.  
—  
*Larceny.*

BLACKBURN, J., to the jury.—The prisoner had a right to keep the umbrella until he had been paid for the trouble he had been put to in repairing it. The question for them to consider was, was he honestly claiming his right when he removed it from the house? If it was honestly done, that would not be stealing; but, on the other hand, if they were of opinion that it was a mere colourable pretence to obtain possession, then it would be larceny. It did not matter whether anything was due to him, if, at the time he took it, he honestly intended to hold it as a security for his alleged lien.

*Not guilty.*

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### NORFOLK CIRCUIT.

BURY ST. EDMUND'S WINTER ASSIZES, 1869.

(Before Mr. Justice BLACKBURN.)

REG. v. SPOOR.(a)

*Coroner's inquisition—Witnesses for prisoner—Practice.*

*When a person is committed for trial on the coroner's inquisition for manslaughter, the case ought properly to be investigated by the magistrates, in order that the prisoner may have the opportunity of calling witnesses and having them bound over to appear at the trial, in accordance with sect. 3 of 30 & 31 Vict. c. 35.*

THE prisoner, Mary Anne Spoor, was arraigned upon the coroner's inquisition for the manslaughter of an illegitimate child at Wenhaston.

*Mills for the prosecution.*

*Cherry for the prisoner.*

After the case for the prosecution had closed, *Cherry* wished to call some witnesses, but they had not been bound over to appear, and were not in attendance, and the poverty of the prisoner prevented her having them in readiness.

BLACKBURN, J.—In all these cases, where the coroner commits a person for trial, it is the proper course for an investigation to take place before magistrates, in order that if the person charged wishes to call witnesses he may have them bound over to appear.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

The object of the recent act of Parliament, 30 & 31 Vict. c. 35, was in all cases to give a prisoner an opportunity of having witnesses if he thought fit to call them. I think, since the passing of that act, it would only be fair that the magistrates also should inquire into the facts, so that the prisoner might not be deprived of any assistance which the law gives him. I merely throw this out as a suggestion, which I trust will for the future be acted upon in similar cases. There are obvious advantages in the course I have indicated.

REG.  
v  
SPOOR.  
—  
1869.  
—  
*Manslaughter*  
—*Practice.*

*Not guilty.*

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## OXFORD CIRCUIT.

STAFFORDSHIRE LENT ASSIZES, 1870.

(Before Mr. Justice LUSH.)

REG. v. WILLIAM TURNER. (a)

*Embezzlement—"Clerk or servant"—Commission.*

*The prisoner agreed with the prosecutor, a manufacturer of earthenware, to act as his traveller, and "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the prosecutor, and that he would not, without the consent in writing of the prosecutor, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid, for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts.*

*The prosecutor subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement under 24 & 25 Vict. c. 96, s. 68:*

*Held, that he was a "clerk or servant" of the prosecutor within the meaning of that statute.*

*Reg. v. Bowers (10 Cox Crim. Cas. 254; 14 L. T. Rep. N.S. 671) and Reg. v. Marshall (ante, p. 490) cited and distinguished.*

**T**HE prisoner was indicted for embezzlement.

The indictment charged that he on the 23rd of April, 1869, being then a servant to Richard Edwards, did, by virtue of his

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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employment, and while he was so employed as aforesaid, receive and take into his possession certain money, to wit, the sum of 34l., for the said Richard Edwards his master, and then fraudulently and feloniously did embezzle the same.

Two other counts followed of a similar form but relating to different sums.

*Motteram* and *Brindly* for the prosecution.

*Young* for the prisoner.

The prosecutor, a manufacturer of earthenware at Burslem, had employed the prisoner as his traveller under a written agreement, the material parts of which ran thus:—"The said Charles William Turner, for the considerations hereinafter mentioned (viz., a commission), for himself, his executors and administrators, hereby agrees to and with the said Richard Edwards, his executors, administrators, and assigns, that he the said Charles William Turner, from the day of the date hereof, shall and will act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the said Richard Edwards, at such prices and on such terms as shall be from time to time set forth in a schedule of prices to be delivered to him by and under the hand of the said Richard Edwards; and, further, that he the said Charles William Turner shall and will use his best endeavours and means to sell and dispose of the same goods at such prices and terms; and in all cases when he shall not receive any express direction relative thereto, will so act therein as will, to the best of his judgment, be most beneficial to the said Richard Edwards. And also, that he the said Charles William Turner shall and will pay and defray out of his own proper moneys all his travelling and hotel and other expenses. And shall not nor will, without the consent in writing of the said Richard Edwards, at any time during the continuance of the agreement, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid for or on account of himself or any other person or persons except the said Richard Edwards."

In other clauses it was further agreed that the prisoner should be paid by a commission payable quarterly, and that he should forthwith account for and "pay over unto the said Richard Edwards . . . all sums of money, bills, notes, and securities," which should have been received by or come to his hands for or on account of the said Richard Edwards. A supplemental agreement was afterwards entered into by the parties, by which it was arranged that the prisoner should cease to take orders in London, and another supplemental agreement provided that the prisoner should render his accounts weekly.

The agreements were put in and read. Evidence was given of acts of embezzlement.

From the cross-examination of the prosecutors' manager, it appeared that Mr. Richard Edwards had given the prisoner

permission, in writing, to sell china for Mr. Baguley, of Hanley, another manufacturer, and also to sell for Messrs. Edwards, of Longton; and the witness admitted that he knew that the prisoner had collected accounts for Messrs. Minton and Co. since he had been in the employ of the prosecutor.

These facts having been elicited,

*Young* submitted that the prisoner was not a "clerk or servant" within the meaning of 24 & 25 Vict. c. 96, s. 68, and that there was nothing on the face of the agreement to show that he was bound to employ his whole time for the benefit of the prosecutor; on the contrary, the prosecutor had given him permission to take orders for other manufacturers. A variation had been made with reference to the time of rendering the account. In *Reg. v. Bowers* (10 Cox Crim. Cas. 254; 14 L. T. Rep. N.S. 671) it was held that "a person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within the meaning of this act." In the present case the prisoner was paid by commission only.

LUSH, J.—In *Reg. v. Bowers* there had been a material alteration in the position of the parties; the prisoner, having been originally a traveller, had set up a business on his own account.

*Young*.—It cannot be said that the prisoner's whole time was at the disposal of the prosecutor in this case. In *Reg. v. Marshall* (*ante*, p. 490), a traveller was paid by commission, received no salary, and was at liberty to go where he pleased for orders; and it was held that he was not a "clerk or servant" within the statute relating to embezzlement.

LUSH, J.—I was party to that decision, and I think it is very much against you. Here the prisoner was bound by the terms of the agreement "diligently to employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders;" surely he was obliged to devote his whole time to the service of the prosecutor.

LUSH, J., to the jury.—After distinguishing larceny from embezzlement, and commenting on the facts of the case: Now, was the prisoner a "clerk or servant" within the meaning of the statute? That depends on the terms of his employment. If a person says to another carrying on an independent trade, "If you get any orders for me I will pay you a commission," and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a "clerk or servant;" but if a man says, "I employ you and will pay you, not by salary, but by commission," then the person employed is a servant. And the reason for such distinction is this—that the person employing has no control over the person employed as in the first case, but where, as in the second instance I have put, one employs another and binds him to use

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his time and services about his (the employer's) business, then the person employed is subject to control. Here Turner agrees with Mr. Edwards that he shall and will from the date of the agreement "act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town . . . and soliciting orders." It is, therefore, clear that he was employed as "clerk or servant" by Mr. Edwards, who had full control over his time and services.

*Guilty.*

Attorney for the prosecution, *Sutton*, Burslem.

Attorney for the prisoner, *Tomkinson*, Burslem.

## COURT OF CRIMINAL APPEAL.

*April 30, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J.,  
and CLEASBY, B.)

REG. v. WILLIAM ROE.(a)

*Larceny—Birds feræ naturæ—Indictment—Evidence.*

*The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive, but in a dying state : Held, that the indictment was not proved.*

CASE reserved for the opinion of this Court.

At the General Quarter Sessions of the peace of our sovereign Lady the Queen for the county of Derby, holden at Derby on the 4th of January, 1870, before Thomas William Evans, Esq. (chairman), Robert Sacheverell Wilmot Sitwell, Esq. (deputy chairman), and other justices, &c.

Whereas, at the present sessions William Roe has been tried before me upon an indictment of which the following is a copy :—

Derbyshire, } The jurors of our Lady the Queen upon their  
to wit. } oath present, that William Roe, on the 16th of  
September, 1869, feloniously did steal, take, and carry away one

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



dead partridge of the goods and chattels of George Newdigate, Esq., against the peace of our Lady the Queen, &c.

*Second count.*—And the jurors aforesaid upon their oath aforesaid do further present, that the said William Roe, on the said 16th of September in the year aforesaid, feloniously did receive one dead partridge of the goods and chattels of George Newdigate, Esq., then lately before feloniously stolen, taken, and carried away by a certain evil disposed person, he, the said William Roe, well knowing the said last-mentioned goods and chattels to have been feloniously stolen against the form of the statute, &c.

*Third count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Roe on the said 16th of September in the year aforesaid, feloniously did steal, take, and carry away one dead partridge, of the goods and chattels of Francis William Newdigate, against the peace, &c.

On the 16th of September last, Colonel Henry Newdigate, Major George Newdigate, and the Rev. Mr. Howman, were out shooting at Kirk Hallam, in this county, on land belonging to Colonel Francis William Newdigate, accompanied by his keeper, Mr. Hancock.

A covey of partridges rose, and was fired at by the Rev. Mr. Howman; one of the birds came back round Major Newdigate, who fired at it. The bird crossed a canal, towered, and fell in a field belonging to Colonel Francis William Newdigate, and over which he had the right of shooting, but in the occupation of his tenant.

The prisoner, who was a boatman, and on the canal bank, entered the field, and either picked up or caught the bird.

The evidence as to the condition of the bird when caught or picked up was conflicting, but it was afterwards given to the keeper by the prisoner, and was dead at the time.

Counsel for the prisoner contended that there was no case to support a charge of larceny; that if there was a single spark of life left in the bird when picked up by the prisoner it could not be larceny.

It is uncertain who gave the bird its mortal wound.

I left to the jury the following questions:

1. By whom was the bird shot?—*Answer.* No evidence to prove by which of the party the bird was shot.

2. Are you of opinion the bird was dead when picked up, or was it in a dying state, and so disabled that it could not escape?—*Answer.* We believe the bird was alive, but in a dying state, and so disabled that it could not escape.

3. Are you of opinion that the prisoner took the bird fraudulently, and with intent to deprive the owner of it?—*Answer.* Yes.

The opinion of the Court is asked:—

First, whether the bird picked up by the prisoner in a dying state and so disabled that it could not escape was the subject of larceny?

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Secondly, whether the property in the bird was sufficiently laid in Colonel Francis William Newdigate?

R. S. W. SITWELL, Deputy Chairman.

No counsel appeared for the prisoner.

*C. H. Roe* for the prosecution.—The conviction was right. If the partridge was a bird *feræ naturæ*, it was reduced into possession by being killed, and became, therefore, the subject of larceny. [WILLES, J.—It does not appear that it was dead when the prisoner picked it up or caught it, or by whom the mortal wound was given so as to reduce it into possession. It may have been the boatman who was the immediate cause of its death.] The partridge was in a dying condition, and therefore a property was acquired in it *ratione impotentiae*. In 2 Black. Com. 391, it is said that “a man may be invested with a qualified, but not an absolute, property in all creatures that are *feræ naturæ*, either *per industriam*, *propter impotentiam*, or *propter privilegium*. A qualified property may also subsist with relation to animals, *feræ naturæ*, or *ratione impotentiae* on account of their own inability: as when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires, but till then it is in some cases trespass, and in others felony for a stranger to take them away.” In *Blades v. Higgs* (7 L. T. Rep. N. S. 798), it was held that if rabbits be started and killed on the land of another, they are the property of the person on whose land they are killed, and not of the captor: (Instit. Book 2, c. 1, s. 13, Saun. edit.; *Sutton v. Moody*, 1 Ld. Ray. 250.) [HANNEN, J.—The charge is for stealing a dead partridge, and the proof is that the prisoner took a live partridge.] This partridge was so disabled as to have lost all power of escape, and was therefore to all intents a dead bird. If it is to be taken to be alive, it was reduced into possession by the person who shot it. It was in a field where it could not escape. In *Churchward v. Sturdy* (14 East. 249), it was held that “the plaintiff’s dogs having hunted and caught on the defendant’s land a hare started on the land of another, the property was thereby vested in the plaintiff, who might maintain trespass against the defendant for afterwards taking away the hare. And so it would be, though the hare being quite spent had been caught up by a labourer of the defendant for the benefit of the hunters:” (See also *Earl of Lonsdale v. Rigg*, 26 L. J. 196, Ex.) [WILLES, J.—Suppose the bird had been shot by a third person, and the keeper picked it up and appropriated it to his own use, would that have been larceny or embezzlement?] Embezzlement. [WILLES, J.—I think that is the right view. If so, the bird has not been reduced into possession by the master.]

BOVILL, C.J.—The prisoner was indicted for stealing one dead

partridge, and the only question now is whether the allegation as to that matter was properly proved. The property is laid in different counts to be in George Newdigate and Francis William Newdigate. If the indictment had simply alleged that the prisoner had stolen one partridge it would have been bad, for, to make a partridge the subject of larceny, it must be shown either that it was dead, or if alive that it was reduced into possession, or that it was under the owner's control. In this indictment it is alleged that the partridge was dead. This allegation is not a matter of form merely, but it is one of substance, as was held long ago in *Rough's case* (2 East. P. C. 607). The proof on the trial was that the bird was wounded and was either picked up or caught by the prisoner. At the time it was picked up or caught by the prisoner it was alive, but in a dying state, *i.e.*, the prisoner caught, while it was alive, a wounded partridge. The proof therefore fails to establish the charge in the indictment that the prisoner stole one dead partridge. If the partridge had been reduced into possession there might have been some ground for charging a larceny in a different form, but we cannot enter into the question on the present indictment. The conviction, therefore, cannot be sustained.

WILLES, J.—I am of the same opinion. By the decision in *Blades v. Higgs*, it was never intended that poachers should be put on the same footing with felons. I entirely concur in the judgment of the Lord Chief Justice. I wish, however, to state for myself that I am not satisfied that if the partridge had been dead when picked up by the prisoner it would have been sufficiently reduced into possession so as to sustain the charge of larceny. I illustrated my view in the course of the argument, by the keeper picking up a dead bird and embezzling it.

BYLES, J.—It was necessary to allege in the indictment that the partridge was either dead or, if alive, that it was reclaimed, or in captivity, or reduced into possession. The indictment here states that it was dead, whereas it is found by the jury that it was alive. The indictment, therefore, was not proved, and the conviction cannot be sustained.

HANNEN, J., and CLEASBY, B., concurred.

*Conviction quashed.*

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## COURT OF CRIMINAL APPEAL.

May 7, 1870.

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. CHUGG.(a)

*Perjury—Affiliation summons—Jurisdiction of justices—  
7 & 8 Vict. c. 101, s. 2.*

*The mother of a bastard child, born on the 20th of March, 1868, laid an information before a justice on the 18th of April, 1868, against the defendant, the putative father, under 7 & 8 Vict. c. 101, s. 2. A summons was issued on the same day, but never served, as the defendant could not be found by the process-server to whom the summons was given. On the 14th of January, 1870, about a fortnight after the mother had found out the defendant's address, she applied for and obtained another summons, which was served on the defendant, and he appeared thereto, and, being examined on oath, committed the perjury assigned :*

*Held, that the justices had jurisdiction to hear the complaint, although at the time of service of the summons more than twelve months had elapsed from the birth of the child.*

CASE reserved for the opinion of this Court by Mr. Justice Hannen.

The prisoner was tried before me at the Devon Spring Assizes, on an indictment charging him with perjury in his evidence on the hearing of an information and complaint in bastardy at a petty sessions of the justices for the peace acting for the division of Braunton, in the county of Devon, wherein one Betsy Hill was the complainant and the prisoner was the defendant.

It was proved that Betsy Hill was delivered of a bastard child on the 20th of March, 1868, and that on the 18th of April, 1868, she duly laid an information before a justice of the petty sessional division in which she resided that the prisoner was the father of

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

such child, and made application for a summons to be served upon the prisoner to appear and answer her complaint.

On this information a summons was, on the 18th of April, 1868, issued by the said justice requiring the prisoner to appear on the 6th of May, 1868, to answer the complaint of the said Betsy Hill.

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It was proved by the police constable to whom the said summons was given for the purpose of serving it on the prisoner, that he inquired for the prisoner at his house, but that he was not there, and that he made search for him, but could not find him.

Betsy Hill stated that the prisoner was away from his home at the time the summons was issued, and that she did not see the prisoner or know where he was until about a fortnight before the 14th of January, 1870, on which day she applied for and obtained a summons, calling on the prisoner to appear on the 2nd of February, 1870, to answer her complaint.

The following is a copy of this summons :

To William Chugg, of the parish of Chittleham-holt, in the said county, farmer's son.

Devon, } Whereas, application was, on the 18th of April,  
to wit. } 1868, made to me, the undersigned, one of Her Majesty's justices of the peace for the said county, by Betsy Hill, single woman, residing at Tawstock, in the petty sessional division of Braunton, in the said county, for which I act, who had then been delivered of a bastard child, since the passing of the Act of the eighth year of Her present Majesty, intituled "An Act for the further Amendment of the Laws relating to the Poor in England," within twelve calendar months from the said 18th of April, 1868, and of which bastard child she alleges you to be the father, for a summons to be served upon you to appear at a petty session of the peace, according to the form of the statute in such case made and provided. These are, therefore, to require you to appear at the petty session of the justices, to be holden at the Guildhall, Barnstaple, in the said county, being the petty session for the division of Braunton, in which I usually act, on Wednesday, the 2nd of February next, at twelve o'clock at noon, to answer any complaint which she shall then and there make against you touching the premises. Herein fail you not.

Given under my hand, at Barnstaple, in the county aforesaid, this 14th of January, 1870.

JAMES J. HIERN.

This summons was served on the prisoner, and he appeared in obedience to it on the day named thereon, when he stated, on oath, that he did not know the said Betsy Hill, and had never seen her before.

It was objected, on behalf of the prisoner, that the Justices had no jurisdiction to hear the complaint, more than twelve

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months having elapsed between the birth of the child and the application of Betsy Hill for the summons to which the prisoner appeared.

I reserved the point.

The jury found the prisoner guilty, and I sentenced him.

JAMES HANNEN.

*S. Carter*, for the prisoner.—The justices had no jurisdiction to hear the complaint. The first summons was not proved in evidence. The summons of the 14th of January, 1870, which was proved and is set out, contains a false recital. [WILLES, J.—If the putative father appears before the magistrates, that is sufficient to give them jurisdiction so as to support a conviction for perjury against him: (*Reg. v. Smith*, ante, p. 10.)] If it was a mere question of process, that would be so. By the 7 & 8 Vict. c. 101, s. 2, the mother of a bastard child may apply within twelve months from the birth for a summons to be served on the putative father, and the magistrates are thereupon to issue their summons to him to appear at the petty sessions. The summons must be issued and served within the twelve months. [BOVILL, C.J.—Why so? Suppose the application made on the last day of the twelve months, and summons then issued but not served until the next day, would not that be good?] The proceedings in such a case would be all so continuous that it might be good. In this case a service of the first summons might have been made; it might have been left at the last place of abode of the putative father: (*Reg. v. Damarell*, 8 B. & S. 659.) The application must be made within twelve months from the birth to give jurisdiction: (*Potts v. Cumbridge*, 27 L. J. 62, M. C.) The following cases were also cited: *Reg. v. Scotton* (5 Q. B. 493), *Reg. v. Brown* (1 L. T. Rep. N. S. 29), *Reg. v. Davis* (22 L. J. 143, M. C.), *Reg. v. Derry* (28 L. J. 86, M. C.), *Reg. v. Pickford* (30 L. J. 133, M. C.), *Reg. v. Lightfoot* (25 L. J. 115, M. C.), *Reg. v. Thomas* (8 L. T. Rep. N. S. 460).

*Murch*, for the prosecution, was not called upon.

BOVILL, C.J.—When the clauses of the Acts upon which this question depends are looked at, it will appear that the decision of the learned Judge at the trial was right, and that this conviction was proper. In this case the jurisdiction of the magistrates depends on this, whether the application of the mother of the bastard child for the summons against the putative father was made within twelve months after the birth of the child. Upon the facts it appears that the application was made within the twelve months, and that a summons thereupon issued, but was not served. The statute makes a marked distinction between the application and the summons. The application must necessarily be made within the twelve months, and the magistrates are required thereupon to issue a summons (7 & 8 Vict. c. 101, s. 2), but the summons need not be served within the twelve



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months. Indeed, there is no enactment which requires the summons to be served within any particular time. If there were, the parties sought to be charged would absent themselves to avoid service, as was the case in *Potts v. Oumbridge*. The subsequent statute, 8 & 9 Vict. c. 10, leaves this question where it was before. The forms given by that Act are such as it shall be sufficient to use to free the proceedings from technical objections. The question reserved for our opinion is concluded by *Potts v. Cumbridge*, where it was held that the summons need not be served until twelve months after the birth of the child. The conviction must therefore be affirmed.

The rest of the Court concurred.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*May 7 and June 4, 1870.*

(Before BOVILL, C.J., WILLES, J., BYLES, J., HANNEN, J., and  
CLEASBY, B.)

REG. v. KILHAM. (a)

*False pretences—Hiring a horse—24 & 25 Vict. c. 96, s. 88.*

*Prisoner, by falsely pretending to a liveryman that he was sent by another person to hire a horse for him, for a drive to E., obtained the horse. The prisoner returned it the same evening, but did not pay for the hire :*

*Held that this was not an obtaining of a chattel with intent to defraud within the meaning of the 24 & 25 Vict. c. 96, s. 88.*

*To constitute such an act there must be an intention to deprive the owner of his property.*

CASE reserved for the opinion of this Court by the Recorder of York.

James Kilham was tried before me, at the last Easter Quarter Sessions for the city of York, on an indictment containing three counts, the first count of which was as follows :

City of York, } The jurors for our Lady the Queen upon their  
to wit. } oath present, that James Kilham, on the  
13th of March, 1870, in the city of York, unlawfully and knowingly

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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did falsely pretend to Henry Burton, then being an ostler in the service of James Thackray and Edward Thackray, then keeping horses for hire in the city aforesaid, that he the said James Kilham was then sent by Mr. Hartley (thereby then meaning a son of Mr. Thomas Gibson Hartley, then living in Davygate, in the said city,) to order and obtain for hire a horse for him, the said first-mentioned Mr. Hartley, to drive on a journey to Elvington, to be ready at half-past nine o'clock the next morning, by means of which said false pretences the said James Kilham did then unlawfully obtain from the said Henry Burton a certain horse of the goods and chattels of the said James Thackray and Edward Thackray, with intent thereby them to defraud. Whereas, in truth and in fact, the said James Kilham was not then sent by the said Mr. Hartley, or any son of the said Mr. Thomas Gibson Hartley, then living in Davygate aforesaid, to order and obtain for hire a horse for him to drive on a journey to Elvington, to be ready at half-past nine o'clock the next morning, as he the said James Kilham well knew at the time when he did so falsely pretend as aforesaid.

There were two other counts slightly varied in form, but the same in substance.

The evidence on the part of the prosecution was that the prisoner had called at the livery stables of Messrs. Thackray, who were duly licensed to let out horses for hire, on the evening of the 13th of March last, and stated to the ostler that he was sent by a Mr. Gibson Hartley to order a horse to be ready the next morning for the use of a son of Mr. Gibson Hartley, who was a customer of the Messrs. Thackray. Accordingly, the next morning the prisoner called for the horse, which was delivered to him by the ostler. The prisoner was seen in the course of the same day driving the horse, which he returned to Messrs. Thackray's stables in the evening.

The hire for the horse, amounting to 7s., was never paid by the prisoner.

Mr. Hartley and his son denied that they had authorised the prisoner to hire any horse for them, or that the prisoner had used the horse for any purpose of theirs.

The prisoner was found guilty, but I respited the sentence, and admitted him to bail till the opinion of the Court for Crown Cases Reserved could be taken.

I desire the opinion of the Court as to whether the prisoner could properly be found guilty of obtaining a chattel by false pretences within the meaning of the stat. 24 & 25 Vict. c. 96, s. 88.

The case of *Reg. v. Boulton* (1 Den. C. C. 508; 3 Cox Crim. Cas. 576) was relied on on the part of the prosecution.

EDWIN PLUMER PRICE, Recorder.

No counsel appeared for the prisoner.

*A. Simpson* for the prosecution.—It must be admitted that the prisoner never intended to steal the horse; and the only

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point is whether the obtaining the loan of the horse by the false pretences, and returning it at the end of the day without paying for the hire, is an obtaining of a chattel by false pretences within the meaning of the statute. It has been held that obtaining a loan of money by false pretences is within the statute (*Reg. v. Crossley*, 2 Moo. & Rob. 17); but in 3 Burns' Justice, 276, it is said: "Perhaps this is true only of moneys and not of other goods." And in 2 Russ. on Crimes, 668, 3rd edit., Mr. Greaves says: "But *query* as to this point. The correct distinction between larceny and false pretences seems to be that in the former the property was not parted with, in the latter it was. (See the cases *ante*, p. 200 *et seq.*) But if these cases show that it would not be obtaining by false pretences, still, if the jury found that the prisoner obtained the loan with intent to steal, that would be larceny, and he might be convicted of that upon this indictment." In *Reg. v. Crossley*, Patteson, J., said: "The words of the 7 & 8 Geo. 4, c. 29, s. 53, were very general. If the jury were satisfied that the prisoner fraudulently obtained the 300*l.* from the prosecutor by a deliberate falsehood, averring that he had all the funds required to take up the bill except 300*l.*, when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, it appeared to him that the jury ought to convict the prisoner. . . . As to the money being advanced by the prosecutor only as a loan, the terms of the Act of Parliament embrace every mode of obtaining money by false pretences by loan as well as by transfer. If the Legislature meant to use the term in a more limited sense, it was to be regretted that they had not used language which could fairly have that effect." In *Reg. v. Boulton* (3 Cox Crim. Cas. 576; 1 Den. C. C. 508), where the prisoner was indicted for obtaining a railway ticket by false pretences, it was held that a railway ticket was a chattel within the meaning of the 7 & 8 Geo. 4, c. 29, s. 53. [BYLES, J.—That was an appropriation of the entire value of the thing.] At p. 645 (note *p*) of Russ. on Crimes, Mr. Greaves says: "*Reg. v. Boulton* was not argued. As the ticket was to be returned to the company at the end of the journey, it is clear the property in the ticket did not pass from the company. Now, in false pretences, the essence of the offence is, that the property has passed from the owner. The decision, therefore, seems very questionable. Suppose a person wanting to ride from A. to B. were falsely to pretend that C. sent him to borrow a horse, and by means of that pretence he obtained the horse and rode it from A. to B., but returned it to the owner, it could hardly be contended that he obtained the horse by false pretences. He obtained the ride by false pretences. So in *Reg. v. Boulton*, what the prisoner obtained was the ride by the train, not the railway ticket; and it is plain that the real intent was to obtain the ride without paying for it." The first statute on false pretences was the 33 Hen. 8, c. 1, intituled, "A Bill against them that counterfeit letters or

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privy tokens to receive money or goods in other men's names." Sect. 2 enacts that if any person falsely and deceitfully obtain or get into his hands or possession any money, goods, chattels, jewels, or other things, of any other persons, by colour and means of any such false token or counterfeit letter made in any other man's name, then every person so offending and being convicted shall be punished, &c. Then the 30 Geo. 2, c. 24, s. 1, enacted that all persons who knowingly and designedly by false pretence or pretences shall obtain from any person money, goods, wares, or merchandises, with intent to cheat or defraud any person, shall be deemed offenders against law and the public peace, &c., &c. The case of *Rex v. Pear* (2 East. P. C. 685), was then cited. At p. 689 there is the following note on that case: "On the debate in this case Eyre, B., adverting to the stats. 33 Hen. 8 and 30 Geo. 2, said he doubted if there was not a distinction in this respect between the owners parting with the possession and with the property in the thing delivered. That where goods were delivered upon a false token, and the owner meant to part with the property absolutely and never expected to have the goods returned again, it might be difficult to reach the case otherwise than through the statutes, *aliter* where he parted with the possession only, for there, if the possession were obtained by fraud and not taken according to the agreement, it was on the whole a taking against the will of the owner, and if done *animo furandi* it was felony.—M.S., Buller, J." In the judgment in *Reg. v. Morrison* (1 Bell C. C. 167), the case of *Reg. v. Boulton* was treated as a decision binding on this court.

*Cur. adv. vult.*

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BOVILL, C.J., now delivered the judgment of the Court.—We are of opinion that the conviction in this case cannot be supported. The stat. 24 & 25 Vict. c. 96, s. 88, enacts that "whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor." The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, &c. This is, to some extent, indicated by the proviso "that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted;" but it is made more clear by referring to the earlier statute, from which the language of the 88th section is adopted. The 7 & 8 Geo. 4, c. 29, s. 53, recites that "a failure of justice frequently arises from the subtle distinction between larceny and fraud," and "for remedy thereof enacts that if any person shall by any false pretence obtain, &c."

The subtle distinction which the statute was intended to remedy was this, that if a person by fraud induced another to part with the possession only of goods and converted them to his own use, this was larceny, while if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny. But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there should be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction the case of *Reg. v. Boulton* was referred to. There the prisoner was indicted for obtaining by false pretences a railway ticket, with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect, that the prisoner, by using the ticket for the purpose of travelling on the railway entirely converted it to his own use for the only purpose for which it was capable of being applied. The conviction must, therefore, be quashed.

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## COURT OF CRIMINAL APPEAL.

June 4, 1870.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., MELLORE, J.,  
and M. SMITH, J.)

REG. v. BUTTLE.(a)

*Perjury—Answers before Commissioners under the Corrupt Practices  
Prevention Act, 1863 (26 Vict. c. 29), s. 7.*

*The 26 Vict. c. 29, s. 7, enacts in a proviso that no statement made  
by any person in answer to any question put by or before an  
election committee or commissioners appointed to inquire into  
corrupt practices at elections shall, except in cases of indictments  
for perjury, be admissible in evidence :*

*Held, that the exception was restricted to indictments for perjury  
committed before the election committee or commissioners, and  
that true answers before such commissioners could not be used  
against the witness to support an indictment for perjury com-  
mitted before another tribunal, such as an inquiry into the validity  
of an election before a judge.*

CASE reserved for the opinion of this Court, by Kelly, C.B.

The prisoner was indicted and convicted at the last Assizes for the county of Somerset for perjury alleged to have been committed at the trial of an election petition in respect of the borough of Bridgwater before Mr. Justice Blackburn.

The perjury assigned was "that he had not received money for his vote," and "that he had not received ten pounds for his vote."

Evidence was given of his having been seen in a passage and at the door of a room in which money was given to several voters for their votes by a person named Allan, and it is possible that with this evidence, though it was by no means conclusive, a conviction might have been obtained; but the counsel for the prosecution then proceeded to prove that upon a commission to inquire into the existence of corrupt practices at the election in question, before certain commissioners, the prisoner was examined as a

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



witness upon oath, and admitted upon such examination that he had received 10*l.* for his vote at the election in question, and he further admitted in express terms that he had sworn falsely upon the trial of the election petition before Mr. Justice Blackburn.

It was contended by the counsel for the prisoner that this evidence was not admissible, and that the exception in relation to perjury in the 26 Vict. c. 29, s. 7, applied only to perjury committed before the commissioners under the commission, and not to perjury committed upon the trial of the election petition, the judgment or report upon which petition had led to the commission of inquiry; inasmuch as it was clear that the prisoner had been compelled under peril of commitment and imprisonment to give evidence before the commissioners, and consequently, that the evidence which he so gave, which was perfectly true, was obtained from him by compulsion; and if it could be used in evidence against him on a criminal charge, the rule of law that no man is bound to criminate himself would be at once nullified and defeated.

I therefore thought it right to reserve the point whether such evidence was admissible for the consideration of the Court of Appeal.

If inadmissible, the verdict of guilty is to be set aside and a verdict of acquittal entered.

FITZROY KELLY.

*T. W. Saunders* for the prisoner.—The conviction was wrong. There is nothing in the 26 Vict. c. 29, s. 7, that makes the answers given by the prisoner to questions put by the commissioners admissible on this indictment. The proviso is that no such answers shall be admissible in evidence in any proceeding, except in cases of perjury, *i. e.*, of perjury assigned in respect of such answers. [KELLY, C.B.—It was not intended by the Legislature that such commissions should be tribunals to extort evidence under peril of imprisonment which might be used not in respect of perjury committed before the commissioners, but before some other body. MARTIN, B., referred to *Reg. v. Garbett*. (1 Den. C. C. 236; 2 Cox Crim. Cas. 448), where it was held that a witness is not compellable to answer a question that may tend to criminate him, and if he does answer upon the compulsion of the Court, such answer cannot be used against him in a criminal proceeding.] The intent of the Act was to obtain as much information as possible with respect to corrupt practices, and to give ample protection to witnesses disclosing facts, but to withhold protection from witnesses who might commit perjury before the commissioners. Therefore, the defendant's evidence before the commissioners, being true, could not be used against him.

*Poole* for the prosecution.—In construing the 26 Vict. c. 29, s. 7, the 15 & 16 Vict. c. 57, s. 8, must be attended to, both enactments being *pari materiâ*. In the 15 & 16 Vict. c. 57, s. 8, the proviso is that the answers before the commissioners shall not

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be admissible except in cases of perjury committed in such answers; whereas, in the 26 Vict. c. 29, s. 7, the exception is not so limited but is merely "except in cases of indictments for perjury." Now, therefore, it is contended that such answers are admissible in cases of perjury generally, arising in any proceeding connected with corrupt practices at elections. The alteration in the language in the two enactments shows that the Legislature did not intend to restrict the admissibility of such answers to the same extent as was done by the 15 & 16 Vict. c. 57, s. 8: (*Reg. v. Scott*, 25 L. J. 128, M. C.; 7 Cox Crim. Cas. 164; *Dears & B.* 47; and *Good v. Job*, 28 L. J. 1, Q. B.)

KELLY, C.B.—It is clear that the verdict must be set aside in this case, and the prisoner acquitted. The question is, what is the meaning and spirit of this enactment which enables the commissioners to put questions of any kind touching the elections in any particular borough the corrupt practices at which they may be appointed to inquire into? It amounts to this, that the commissioners when they have a witness before them, may address him thus: "You must answer all questions which we think proper to ask you; we have the power to compel you to answer, and if you refuse to answer we will commit you to prison; if you answer truly you shall be protected from all consequences. If you expose yourself to a prosecution for bribery or any other offence you shall be effectually protected therefrom, and further, this evidence shall under no circumstances be used against you; but if instead of telling the truth, you attempt to defeat justice by your answers, you will not be protected from the consequences, and you may be indicted for perjury, and your evidence may and must of necessity be used against you." Now, to say that it was ever intended by this Act to compel a witness to answer, and if he answered truly and by such means furnished evidence of a criminal charge in respect of something done upon another occasion, which evidence might be used against him in support of such a charge, would be putting a power into the hands of the commissioners which would be subversive of the great principle "that no man shall be compelled to criminate himself." If we were to put any other construction on the statute we should do a grievous wrong. In a similar Act (15 & 16 Vict. c. 57, s. 8) there are words used which, if they had been used in the Act 26 Vict. c. 29, s. 7, would have expressly protected the witness in a case like this, and it is asked why they should have been omitted if it was not meant to protect the witness in such a case? The only answer that can be given is that those who frame Acts of Parliament sometimes do their work in a negligent manner, and do not fully consider the state of the law they are providing for. The meaning and spirit of the enactment in the 26 Vict. c. 29, s. 7, in my opinion is that if a witness before the commissioners tells the whole truth he shall be protected from all the consequences.

MARTIN, B.—We are asked, on the part of the prosecution, to

put this construction on the *proviso*, that in all cases of indictments for perjury the statements of a witness before the commissioners shall be admissible against him. The Act does not say that they shall be, and if the Act don't mean it, then the common law comes in to aid its interpretation, and the principle applies that no one shall be compelled to criminate himself. It would be contrary to the whole spirit of our jurisprudence to put the construction on the Act the prosecution asks us to put.

BLACKBURN, J.—By the common law any person may refuse to answer questions tending to criminate himself; but by the 26 Vict. c. 29, s. 7, the Legislature has thought proper to take away that privilege, and the proviso is general that no answer to any question put by or before the election commissioners shall, except in cases of indictments for perjury, be admissible in any proceeding. Now, to say that because in the answers of a witness before the commissioners there was something contradictory to something which the witness had sworn elsewhere, say in a county court, he should be liable to be indicted for perjury committed in the county court, and his answers before the commissioners might be used as evidence of it, would be giving a meaning to the enactment which it will not bear, and it would not be consistent with the object of the Act. The whole section seems to have been modelled upon the 15 & 16 Vict. c. 59, s. 8; but for some reason or other the words “in such answers,” in the exception “except for perjury committed in such answers,” have been omitted. It has been said that the omission must have been for some reason. It may be it was thought that the words were superfluous, or it was intended to change the meaning of the enactment. I cannot believe that the latter was the reason, and I believe it was thought that the words were superfluous.

MELLOR, J., concurred.

M. SMITH, J.—The main object of the Legislature was to obtain full information as to corrupt practices at elections from persons who might have been themselves implicated in bribery. Among other enactments for that purpose is the one in question. The intent is to be gathered from the general words of the proviso, and the view I take is that, except where the statements before the commissioners are false, and evidence of them is wanted to support an indictment for perjury in respect thereof, they shall not be admissible in any proceeding.

*Conviction quashed.*

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## COURT OF CRIMINAL APPEAL.

*June 4, 1870.*

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., MELLOR, J., and  
M. SMITH, J.)

REG. V. HENSLER.(a)

*False pretences—Attempt to commit the offence.*

*The prisoner was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent the prisoner 5s.; but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue:*

*Held, that the prisoner might be convicted on this evidence of attempting to obtain money by false pretences.*

CASE reserved for the opinion of this Court by the Recorder of Southampton.

The prisoner, Henry Hensler, was tried before me at the last Quarter Sessions for the town and county of the town of Southampton on the following indictment :

Town and County of the Town of } The jurors for our Lady the  
Southampton, to wit. } Queen upon their oath and  
affirmation present, that Henry Hensler, on the 23rd of October, in  
the year of our Lord 1869, and on divers other days and times,  
unlawfully, knowingly, and designedly, did falsely pretend to one  
John Hutton that the said Henry Hensler was a person named  
Ellen Holmes, a widow, who was proceeding to Sydney, New  
South Wales, with her husband and four children, and was cast  
with her orphans ashore in France, and her husband to the  
boundless deep, and that a certain certificate then shown to the  
said John Hutton was the true and genuine certificate of, and  
duly signed by the British Consul at Boulogne, by means of  
which said false pretences the said Henry Hensler did then  
unlawfully attempt to obtain from the said John Hutton a sum  
of money of the goods of the said John Hutton, with intent

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

thereby then to defraud, whereas in truth and in fact the said Henry Hensler was not a person named Ellen Holmes, a widow, who was proceeding to Sydney, New South Wales, with her husband and four children, and cast with her orphans ashore in France, and her husband to the boundless deep. And whereas, in truth and in fact, the said certificate was not the true and genuine certificate of, and had not been duly signed by the British Consul at Boulogne, to the great damage and deception of the said John Hutton, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

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The attempt to obtain money by false pretences was made by the writing and sending of a letter to John Hutton, Esq., M.P., for Northallerton.

This letter dated October 23, 1869, is as follows :

“Southampton, Oct. 23, 1869.

“Honored Sir,—I humbly hope you will pardon the liberty a poor shipwrecked widow, the native of Northallerton, as taking, in thus addressing you, I beg to state I was proceeding to Sydney, New South Wales, with my husband and four children, thinking of bettering my condition, but fortune proved unkind, and cast me with my poor orphans ashore in France, and my husband to the boundless deep.

“Sir, I have no friends at Northallerton to appeal to, as they all emigrated some years ago, and sir, it is useless me returning home as the workhouse would be my doom, all I want is a outfit, my passage being secured, and to effect that purpose the British Consul at Boulogne as most kindly granted me the enclosed certificate to appeal to the humane and benevolent, one of my children is lying in a dying state owing to the injuries it received at the time of the melancholy catastrophe. Sir, if your late much respected father was living, he would know me, and knowing your family's humane and tender feelings to the truly unfortunate, humbly do I trust you will be so kind as to take my distressed case into your kind consideration, and sir, you will have the prayers of a poor shipwrecked widow and orphans when far away on the ocean. Sir, I have part towards accomplishing my wishes. I will not take up your time with a further detail of my distresses, but will not forget to acknowledge your kindness when I reach my destination.

“I am, Honored Sir, your humble and obedient servant,

“ELLEN HOLMES.

“P.S.—Honored sir, I am waiting your kind and benevolent answer by return of post, as I cannot appeal to any person without my certificate. Sir, please to address to

“ELLEN HOLMES, 12, Simbol-street, Southampton.”

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This letter was addressed for "John Hutton, Esq., M.P., Sowler-hill, Northallerton, Yorks."

With it was enclosed a certificate purporting to be a confirmation of the facts contained in this letter, and to be signed by the English Consul at Boulogne.

Mr. Hutton in answer to this letter sent a post office order for 5s. He also received two other letters dated 30th of October, which are as follows :

" 12, Simbol-street, Southampton,  
" October 30, 1869.

" Honored Sir,—The poor shipwrecked family of the name of Ellen Holmes, that enclosed the British Consuls certificate to your honour and did not receive it back, being in a most destitute state not having sufficient to obtain an outfit and, Sir, I cannot make application without my certificate humbly do I trust you will be so kind as to return it, and your kind answer, as it is useless me returning home to Northallerton, to which place I am a native, one of my children is lying very ill owing to the injuries it received at the time of the melancholy catastrophe.

" I am, honored sir, your humble and obedient servant,

" ELLEN HOLMES.

" 12, Simbol-street, Southampton, Hants."

" Southampton, October 30, 1869.

" Honored Sir,—Thinking you had mislaid my certificate, I wrote to you this morning, since which time I received your letter together with my certificate and a post office order for 5s., and with heartfelt gratitude I return my sincere thanks, and, sir, you will have the prayers of the widow and orphans when far away on the ocean.

" I am, honored sir, your humble and obedient servant,

" ELLEN HOLMES.

" To J. Hutton, Esq., M.P."

Both these letters were addressed, "John Hutton, Esq., M.P., Sowler-hill, Northallerton, Yorks."

Mr. Hutton, on his examination, stated that he knew that the statements contained in the letter of October 23 were untrue.

The counsel for the prisoner objected, on the authority of *Reg. v. Mills* (7 Cox Crim. Cas. 263), that, inasmuch as Mr. Hutton knew the falsehood of the pretences made in the letter of October 23, the prisoner could not be convicted for attempting to obtain money from Mr. Hutton by false pretences.

I overruled the objection, and left the case to the jury, who found that the letters above set out and the certificate were proved to their satisfaction to be in the handwriting of the prisoner, and that the statements in the letters were false to his knowledge, and that the certificate was forged by him, and found him guilty.



I reserved the point raised by the counsel for the prisoner, and have stated this case for the opinion of the Court for the Consideration of Crown Cases Reserved.

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MONTAGUE BERE, Recorder of Southampton.

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*Bullen*, for the prisoner.—The prisoner was indicted and convicted for the misdemeanor of attempting to obtain money by false pretences. The conviction cannot be sustained, because the prosecutor, at the time he parted with his money, knew that the pretences were false. The case in that respect was like *Reg. v. Mills*, where it was held that a statement by the prisoner that he had done more work than was the fact, and so obtaining more pay than he was entitled to, the prosecutor at the time being aware of the true amount of work done by the prisoner, and that the prisoner was making a knowingly false overcharge, was not obtaining money by false pretences within the statute. So again in *Reg. v. Collins* (L. & C. 471; 9 Cox Crim. Cas. 497) it was held that a person could not be convicted of an attempt to pick a pocket if there was nothing in it, and so a larceny could not be committed. In the present case it was impossible to deceive by the letter of the 23rd of October, as the prosecutor knew the statements contained in it to be untrue. As, therefore, the statutable misdemeanor could not have been committed, the prisoner could not be convicted of attempting to commit it. No doubt there was the intent to commit it, but the attempt is a different thing. [BLACKBURN, J.—You may attempt to steal from a man who is too strong to permit you. MELLOR, J.—Or an attempt may be made to steal a watch that is too strongly fastened by a guard. Here the prosecutor had the money, and was capable of being deceived, and the prisoner attempted to deceive him.]

*O. B. Russell*, for the prosecution, was not called upon to argue.

KELLY, C.B.—This is an attempt by the prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post the offence was committed.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., MELLOR, J.,  
and M. SMITH, J.)

June 4, 1870.

REG. v. HADFIELD.(a)

*Obstruction of railway—Alteration of signals—  
24 & 25 Vict. c. 97, s. 36.*

*A drunken man got upon a railway and altered the signals, and thereby caused a luggage train to pull up and proceed at a very slow pace:*

*Held (Martin, B., dissentiente), that this was a causing of an engine and carriage using a railway to be obstructed within the meaning of the 24 & 25 Vict. c. 97, s. 36.*

CASE reserved for the opinion of this Court by the Deputy-Chairman of the Court of Quarter Sessions for the County of Chester.

The prisoner was tried before me at the Quarter Sessions for the county of Chester, held by adjournment at Knutsford, on the 22nd of February, 1870, upon the following indictment, which was framed upon the 36th section of the stat. 24 & 25 Vict. c. 97.

Chester, } The jurors for our Sovereign Lady the Queen upon  
to wit. } their oath present, that Joseph William Hadfield,  
on the 14th of January, 1870, by a certain unlawful act, to wit,  
by unlawfully interfering with and changing certain signals in use  
upon a certain railway called the Manchester, Sheffield, and  
Lincolnshire Railway, in the township of Dukinfield, in the said  
county of Chester, unlawfully and wilfully did obstruct and cause  
to be obstructed a certain engine and carriages then using such  
railway, against the form of the statute in such case made and  
provided, and against the peace of our said Lady the Queen, her  
Crown, and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Joseph William Hadfield, on the day and year aforesaid, unlawfully and wilfully did obstruct

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and cause to be obstructed a certain engine and carriages then using a certain railway, called the Manchester, Sheffield, and Lincolnshire Railway, in the said township of Dukinfield and county of Chester, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown, and dignity.

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On behalf of the prosecution, it was proved that at about eleven o'clock on the night of the 14th of January last, the clerk in charge of the Dukinfield Station of the Manchester, Sheffield, and Lincolnshire Railway, locked up all the doors of that station. He had just previously dispatched the last train timed to stop at that station, and had seen that all persons, passengers, and others had left the station. He then arranged the signals for the night. There was a semaphore signal on the platform, having several arms, with a separate lever to work each arm, and there were two signals at about 200 yards distance from and on either side of the station, one on the "up" line and the other on the "down" line, and both worked by levers from the platform at the station. The clerk put out the lights of the semaphore signal and placed the arms down to indicate the lines "all clear," and the two distant signals he arranged so as to show white lights, also indicating that the lines were clear. He went to bed on the premises, and in a few minutes heard a knocking at the station door, and immediately afterwards he heard a person, who subsequently turned out to be the prisoner, climbing over a door in the wall of the station. The clerk heard the prisoner walk along the platform towards the semaphore signal and rattle the levers. He then looked out of the window and saw that one arm of the signal was at right angles with the post, and another at an acute angle, the former signifying "danger," the latter "caution." He went out and found the prisoner outside the station near to some steps leading to the door over which he had climbed to get into the station. The prisoner was not sober; and having been told by the clerk that he had been seen meddling with the signals, he ran away, but was followed by the clerk, who overtook him and gave him into custody. On his way back to the station the clerk saw a goods train, which under ordinary circumstances would have passed through Dukinfield station without slackening speed, moving slowly through the station on the "up" line, and on arriving at the station he saw that both the distant signals showed red lights indicating "danger," and that all the levers of the semaphore had been altered.

It appeared from the evidence of the driver of the goods train that he had observed the distant signal on the "up" line showing the red light, and that in consequence he shut off steam and approached the Dukinfield station cautiously, and that at the station he brought the train "very near to a stand, and could have come to a stand at any moment;" but, seeing no one on the platform, he passed on.

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It was also proved that the mail train going in the same direction and on the same rails as the goods train was due at Dukinfield station in about half an hour after the goods train so passed through the station.

At the close of the evidence for the Crown it was objected by the counsel for the prisoner that the case was not within the above-mentioned section, as the facts proved did not amount to an "obstruction" within the meaning of the section.

I, however, left the case to the jury, reserving the question hereby raised for the opinion of this Court, and the jury found the prisoner guilty.

Judgment was respited, and the prisoner was discharged upon entering into his own recognisance to come up to receive judgment when called upon.

The opinion of the Court for the Consideration of Crown Cases Reserved is requested as to whether upon the above facts the prisoner was properly convicted.

HARRY MAINWARING,  
Deputy-Chairman of Quarter Sessions  
for the County of Chester.

The stat. 24 & 25 Vict. c. 97, s. 36, enacts, that "whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour." Sect. 35: "Whosoever shall unlawfully and intentionally put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway—or shall unlawfully and maliciously make or show, hide, or remove any signal or light upon or near to any railway—or shall unlawfully and maliciously do or cause to be done any other matter or thing with intent in any of the cases aforesaid to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony."

No counsel appeared to argue for the prisoner.

*Horatio Lloyd* for the prosecution.—The conviction was right. This was an obstruction within the meaning of sect. 36. [MARTIN, B.—I think this was a case within sect. 35, but not within sect. 36. Such an act is not an obstruction of an engine or carriage within the ordinary meaning of language. The stopping of the train was not the direct consequence of the act done.]

KELLY, C.B.—I entertain no doubt about this case. Imme-

diately after, by the act of this man, the signals were changed, a luggage train passed, but he caused it to pass so slowly as to be nearly at a standstill, and, further, it appears that the mail train would have reached the station in half an hour, and serious mischief might have resulted. In my opinion this was just as much obstructing the train as if he had put a log of wood across the railway. I think it was a direct act of obstruction.

REG.  
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HADFIELD.  
—  
1870.  
—  
*Obstruction of  
railway.*

MARTIN, B.—I am inclined to be of a contrary opinion. It appears to me to be a straining of the Act of Parliament, and to carry it further than what it enacts. The obstruction mentioned in the Act is an obstruction of an engine or carriage using the railway. In this case the act done was not in respect either of the engine or carriages, but one which merely induced the driver to go slowly.

BLACKBURN, J.—My opinion is that this was an obstruction within the meaning of the Act. By sect. 35 the doing of certain things maliciously and with intent to obstruct, &c., any engine, tender, carriage, or truck is made a felony. Then sect. 36 enacts, that “whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid and assist therein, shall be guilty of a misdemeanor,” which is a much smaller offence. There the doing of any unlawful act, and thereby obstructing any engine or carriage, although not intending to do so, is made a misdemeanor. On the evidence it appears that a drunken man got upon the railway, and turned the signals, the effect of which was to stop, or cause to go very slowly, a luggage train, and thereby the whole machinery and working of the railway were altered for a time. Can that be said to be an obstruction? I think anything which has the effect of preventing a train going on at its ordinary speed would be an obstruction within the meaning of the Act.

MELLOR, J.—Sect. 35 defines a number of unlawful acts, which, if done with intent to obstruct any engine or carriage, constitute felony. Then sect. 36, instead of repeating those acts, says, whosoever, by any unlawful act, shall obstruct, or cause to be obstructed, any engine or carriage, shall be guilty of a misdemeanor. I think sect. 36 was intended to include such an act as that done by the prisoner.

M. SMITH, J.—I think that an unlawful act, by which railway signals are altered, and a train is stopped or checked in its course, is a causing to be obstructed within sect. 36. Sect. 35 throws light on sect. 36 on the very point under discussion. I think the conviction was right.

*Conviction affirmed.*

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1. The first group of respondents (n = 10) was composed of individuals who had been involved in a romantic relationship for a minimum of 10 years. This group was selected to represent long-term relationships.

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1601 UV-Visible Spectrophotometer.

1. The first group of respondents (n = 10) was composed of students who had completed the course and were currently employed in a health care setting. The second group (n = 10) was composed of students who had completed the course and were currently employed in a health care setting. The third group (n = 10) was composed of students who had completed the course and were currently employed in a health care setting. The fourth group (n = 10) was composed of students who had completed the course and were currently employed in a health care setting. The fifth group (n = 10) was composed of students who had completed the course and were currently employed in a health care setting.

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840.

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*Journal of Management Education* 30(6)p.789-804

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It was also proved that he had received the goods which were the subject of the indictment, and that those goods were stolen.

I told the jury that the Legislature must be taken to have intended that the notice should have the operation which, upon the face of it, it purported to have, and that the prisoner ought to be deemed to have known such goods to have been stolen until he proved the contrary.

The prisoner was not defended by counsel, but, entertaining doubts whether the above direction was right, I reserved a case for the opinion of this Court, and admitted the prisoner to bail.

The question for the opinion of the court is whether my direction to the jury was right.

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No counsel appeared on either side.

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*Conviction quashed.*

proving that such person knew the goods to be stolen which form the subject of the proceedings taken against him. Any constable or police-officer may, if authorised so to do in writing by a chief officer of police, enter any house, shop, warehouse, yard, or other premises in search of stolen goods, and make such search and seize and secure any property he may believe to have been stolen, in such manner as he would be authorised to do if he had a search warrant, and the property seized, if any, correspond to the property described in such search warrant; provided that in every case in which any property is seized, the person on whose premises it was at the time of seizure, or the person from whom it was taken if other than the person on whose premises it was, shall, unless previously charged with receiving the same, knowing it to have been stolen, be summoned within three days before a justice of the peace or other competent magistrate to account for his possession of such property, and such justice or other magistrate shall make such order respecting the disposal of such property as the justice of the case may require; and it shall be lawful for any chief officer of police to give such authority as aforesaid in the following cases: First, when such premises are at, or have been within eighteen months of, the time of such search in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves. Secondly, when such premises are at the time of such search in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment. And it shall not be necessary for such chief officer of police in giving such authority to specify any particular property; but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods."

(a) The case is *Reg. v. Harwood*, for a correct report of which see *ante*, p. 388.

REG.

v.

DAVIS.

1870.

*Receiving  
stolen goods—  
Evidence.*

## COURT OF CRIMINAL APPEAL.

June 4, 1870.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., MELLOR, J., and  
M. SMITH, J.)

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KELLY, C.B.—It appears that the learned commissioner, in directing the jury as he did, acted on an erroneous report as to what Keating, J., had ruled in a similar case.<sup>(a)</sup> We think that the statute does not give the notice the operation that the learned commissioner told the jury it had given to it, and that the conviction must be quashed.

*Conviction quashed.*

proving that such person knew the goods to be stolen which form the subject of the proceedings taken against him. Any constable or police-officer may, if authorised so to do in writing by a chief officer of police, enter any house, shop, warehouse, yard, or other premises in search of stolen goods, and make such search and seize and secure any property he may believe to have been stolen, in such manner as he would be authorised to do if he had a search warrant, and the property seized, if any, correspond to the property described in such search warrant; provided that in every case in which any property is seized, the person on whose premises it was at the time of seizure, or the person from whom it was taken if other than the person on whose premises it was, shall, unless previously charged with receiving the same, knowing it to have been stolen, be summoned within three days before a justice of the peace or other competent magistrate to account for his possession of such property, and such justice or other magistrate shall make such order respecting the disposal of such property as the justice of the case may require; and it shall be lawful for any chief officer of police to give such authority as aforesaid in the following cases: First, when such premises are at, or have been within eighteen months of, the time of such search in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves. Secondly, when such premises are at the time of such search in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment. And it shall not be necessary for such chief officer of police in giving such authority to specify any particular property; but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods."

(a) The case is *Reg. v. Harwood*, for a correct report of which see *ante*, p. 388.

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## COURT OF CRIMINAL APPEAL.

June 4, 1870.

(Before KELLY, C.B., MARTIN, B., BLACKBURN, J., MELLOR, J., and  
M. SMITH, J.)

REG. v. JOHN DAVIS.(a)

*Habitual Criminals Act, 1869, s. 11—Receiver of stolen goods—  
Previous conviction—Notice to prisoner.*

*A notice to a person charged with feloniously receiving stolen goods under sect. 11 of 32 & 33 Vict. c. 99 (the Habitual Criminals Act) that proof is intended to be given against him of a previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary, does not dispense with evidence of guilty knowledge on the part of the prosecution.*

CASE reserved for the opinion of this Court by Hardinge S. Giffard, Esq., Q.C., sitting as Commissioner, &c.

John Davis was tried and convicted before me at the last assizes for the county of Glamorgan upon an indictment charging him with receiving stolen goods knowing them to be stolen.

At the trial a notice under the 11th section of the 32 & 33 Vict. c. 99(b) was proved to have been duly served upon the prisoner.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The stat. 32 & 33 Vict. c. 99, s. 11, enacts that—"Where any person who, either before or after the passing of this Act, has been previously convicted of any offence specified in the first schedule hereto [*First schedule.*—Any felony not punishable with death also, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or misdemeanor, under sect. 58 of 24 & 25 Vict. c. 96] and involving fraud or dishonesty, is found in the possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen; and in any proceedings that may be taken against him as receiver of stolen goods, or otherwise in relation to his having been found in possession of such goods, proof may be given of his previous conviction before evidence is given of his having been found in possession of such stolen goods; provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary. Moreover, where proceedings are taken against any person for having in his possession stolen goods, evidence may be given that there were found in the possession of such person other goods stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of

It was further proved that in the year 1867 the prisoner had been convicted of larceny.

It was also proved that he had received the goods which were the subject of the indictment, and that those goods were stolen.

I told the jury that the Legislature must be taken to have intended that the notice should have the operation which, upon the face of it, it purported to have, and that the prisoner ought to be deemed to have known such goods to have been stolen until he proved the contrary.

The prisoner was not defended by counsel, but, entertaining doubts whether the above direction was right, I reserved a case for the opinion of this Court, and admitted the prisoner to bail.

The question for the opinion of the court is whether my direction to the jury was right.

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*Conviction quashed.*

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## COURT OF CRIMINAL APPEAL.

Nov. 12, 1870.

(Before COCKBURN, C.J., CHANNELL, B., KEATING, J., BRETT, J.,  
and CLEASBY, B.)

REG. v. DOWNING. (a)

*Larceny—Oyster bed in a tidal river—Proof of separate fishery.*

*In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, e.g., that the prosecutor and his father, for forty-five years since 1815, had exercised the exclusive right of oyster fishing in the locus in quo, and that in 1846 an action had been brought to try the right and the verdict given in favour of the prosecutor.*

CASE stated for the opinion of this Court by the Chairman of the Quarter Sessions for Cornwall.

At the Quarter Sessions for Cornwall, held on the 28th June, 1870, the prisoner was indicted and convicted for stealing on the 17th April, 1870, from a certain oyster bed called the lower rights in Porth Nevas Creek, on the Helford river, the property of John Tyacke, and sufficiently known as the property of the said John Tyacke, 190 oysters, against the form of the statute.

No documentary evidence was produced in proof of the right of Mr. Tyacke to the oyster bed; but the following verbal evidence was given on the part of the prosecution:—

Thomas Couch stated as follows: I am in the employ of Mr. Tyacke. He is owner of the upper and lower rights in the Helford river. The upper rights are above Calamansack Bar, and the lower rights below that bar and in Porth Nevas Creek. They are known by marks. On Saturday, the 17th April, police-constable Brown accompanied me to the lower rights. I left him on the north side of the lower rights, and on the right of Porth Nevas Creek. I went up near the bar to the other part of the rights. The tide made a great out on that day. The water was very low. I saw Abraham Downing on the oyster beds on the lower rights, and others also. After leaving Brown, I was called back by him. I went back, and I saw the prisoner and Brown on the oyster ground, near Porth Nevas, and in the lower rights. I saw an oyster bag and oysters in it. Police-constable Brown had

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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it. Prisoner said, "Tom, you ain't going to put me away." I said, "The policeman has got you now." We went up the river in a boat. There were several other persons there. Abraham Downing said, "He supposed he should have a few months." I have known prisoner before. He has worked with me on these beds, under Mr. Tyacke, perhaps for twelve months. I have worked there forty years in the employ of Mr. Tyacke and his father.

On cross-examination the same witness said as follows: People have never gone there without denial. Higher rights defined by line across the river from a rock to a tree. Mr. Tyacke has oyster beds there. I have never carried oysters from the lower rights to the higher rights; no marks on the beds there. We have marks on the shore. Budock Vean Estate comes down to the river. This was just under the estate. I have seen people picking up winkles and cockles there. I never denied them. I have laid oysters there. I did so last season. I have taken oysters from there and placed them in the pond.

Re-examined: The tide is not so low as it was then; three times in a year.

John Brown stated as follows: I am a police constable stationed at Constantine. On Sunday, the 17th April, between eleven and twelve a.m., the last witness put me across to Porth Nevas Creek in a boat. I was in plain clothes. I had on plain trousers, and I took a pistol, not loaded, with me, as I could not carry my staff in plain clothes. Couch left me on the shore. I concealed myself and remained watching the oyster beds. I saw prisoner come down with others on to the oyster beds. He was dressed as a sailor, and had on high sea boots up to his knees. He went to the left out in the river on to the oyster beds. I saw something under his arm. He dropped a bag, and picked up something and put in the bag. He came within twenty feet of me. I walked up to him, and said, "It's oysters, I see; you have no right to take them." Prisoner said, "I know I've no right to take them; I suppose I shall get five or six months for it." I said, "You must go to the boat with me to Couch." I had signed to Couch to come over. I went towards him with the prisoner and the oysters. The boat was 500 yards off. Some other persons followed us to the boat. I said to prisoner. "You have stolen these oysters, and I shall take you in charge to Merther." He said, "Don't take me there this time; I won't come any more." As I put him into the boat, one of the others said, "Wait a moment, Aby, I'll put you to rights," and came towards us. I was in the water. I took out my pistol, and said, "You had better keep your distance; I am not going to be put in the water by you." There were 190 oysters in the bag. I now produce the bag and the oysters. I have had them in my custody ever since. This took place in the middle of the river.

John Tyacke stated as follows: I am owner of the oyster-beds and fisheries in Helford river. I rent the higher rights from Sir Richard Vyvyan. I am owner of the lower rights. I am

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owner of the oyster-beds and rights in the Helford river. Upper rights are above Calamansack Bar. The bound between the upper and lower rights is marked by a stone on one side of the river and a quarry on the other. Below this are the lower rights in Porth Nevas Creek. I have, with my father, exercised the exclusive right of oyster-fishing over these rights for fifty-five years, since 1815. I pay rates for the fishing. The prisoner was in my employ, and worked on these fisheries in the lower rights. I hold the exclusive right of oyster fishing. Prisoner had no right to take oysters.

On cross-examination this witness said as follows: The rights were questioned before 1846, but never since that date. A trial took place at that time; an action was brought, and a verdict was given in my favour. The public go there to pick up winkles and cockles, but never on the oyster beds. I take the oysters up from the beds in the lower rights to my pond, which is my store. The public fish in the lower rights and draw seines there. They pick up winkles and cockles, but not mussels, as they are mixed with the oysters. They are not allowed to go on oyster beds; vessels and boats ground on the sand in the lower rights.

On re-examination the same witness said: There are not oysters all over the rights. People pick winkles, &c., but not where oysters are. More than two-thirds of the river have no oyster beds. The oysters produced are my property.

On behalf of the prisoner it was contended that if the prosecutor holds the right in the oyster bed by deed the deed should be produced, and that the right cannot be proved by the verbal evidence of the prosecutor.

The Court overruled the objection, and admitted the prosecutor's verbal evidence as to the ownership of the oyster bed, and the jury returned a verdict of guilty.

The Court, however, agreed to grant a case on the point raised by prisoner's advocate, and sentence was deferred till the opinion of the Court above could be obtained.

The prisoner has since been bailed to appear when called on to receive the judgment of the Court.

C. RASHLEIGH,

Chairman of Quarter Sessions for the County of Cornwall.

*Cole*, Q.C., for the prisoner.—The objection is well founded. The indictment is based upon the statute 24 & 25 Vict. c. 96, s. 26, which enacts "that whosoever shall steal any oysters, or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny," &c. Upon this indictment the prosecutor was bound to prove a legal title to the oyster bed from which the prisoner took the oysters. The bed was not marked out, and the indictment relies on the averment that the bed was sufficiently known. This is a tidal river, and any person claiming an exclusive fishery therein must

prove his title thereto, his claim being in derogation of a public right. The law on this point is well stated in Selwyn's "Nisi Prius," tit. "Fishery," thus: "The right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown in like manner as the right of fishing in a private or inland river is originally lodged in the owner thereof. But, although the king is the owner, and as a consequence of his property hath the primary right of fishing in the sea, or creeks, or arms thereof, yet all the king's subjects in England have regularly a liberty of fishing in the sea and the creeks and arms thereof as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers, where the king or some particular subject hath gained a proprietary exclusive of that common liberty either by the king's charter or grant, or by custom and usage, or prescription. It appears from this passage that Lord Hale thought an exclusive right of fishery in an arm of the sea might belong to a subject, and of this opinion was the Court of King's Bench in another case, where it was decided that a plea which prescribed for a several fishery in an arm of the sea was good; but it was there said that, as the presumption in such case was in favour of the king and the public, it was incumbent on the plaintiff to prove his exclusive right agreeable to the rule laid down by Lord Hale in 1 Mod. 105, that if anyone will appropriate a privilege to himself the proof lies on his side." So in *Reg. v. Stimpson* (4 B. & S. 301), which was an information under the 24 & 25 Vict. c. 96, s. 24, for attempting to take fish in the Waveney river, where the prosecutor had a private right of fishery, Wightman, J., said, "But in the present case the claim of the prosecutor was *prima facie* against common right, and it was necessary that he should produce evidence in support of such a claim." It was not sufficient in this case that the prosecutor proved that, in fact, he had used the bed as a several fishery; but, as his claim was in derogation of the public rights he should have produced his title deeds in support of his claim.

*Metcalfe* (*Pindar* with him), for the prosecution, was not called upon to argue.

COCKBURN, C.J.—This case is free from any doubt. The prisoner was caught stealing oysters from an oyster bed, by his own acknowledgment. At the trial the prosecutor proved by oral evidence that from the year 1815 to the present time he and his father had been in the possession and enjoyment of the oyster bed, and had asserted an exclusive right thereto; that their exclusive right to this oyster bed was challenged, and that in 1846 an action was brought to try the right, and a verdict given in favour of the prosecutor, and that since then, down to this time, the prosecutor's right had not been challenged. It was said that this evidence was not sufficient, and that the prosecutor's right ought to have been proved by deed. It is quite true that this oyster bed was

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in a navigable river, where the public had *primâ facie* a right to fish; but it is equally true that by ancient grant or prescription a private person may have an exclusive right to a separate fishery therein. Then the only question is, can such an exclusive right be proved by parol. It is clear that prescriptive rights may be proved by parol evidence. Indeed, what better proof can there be against a wrongdoer than that of an uninterrupted user or enjoyment of the right for forty or fifty years? and in such a case a jury would be told that a claimant from such long continued uninterrupted enjoyment of the right claimed would have the right. In the present case the evidence was abundantly sufficient to establish the right. The conviction will therefore be affirmed.

The rest of the COURT concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

November 12, 1870.

(Before COCKBURN, C.J., CHANNELL, B., KEATING, J., BRETT, J.,  
and CLEASBY, B.)

REG. v. WARBURTON. (a)

*Conspiracy to defraud a partner.*

*Prisoner and L. were in partnership, and there being notice of dissolution, prisoner conspired with W. and P. in order to cheat L., on a division of assets at the dissolution, by making it appear by documents and entries in the books that P. was a creditor of the firm; and by reason thereof, partnership property was to be abstracted for the alleged object of satisfying P.:*

*Held that this was an indictable conspiracy.*

CASE stated for the opinion of this Court by Mr. Justice Brett.

The prisoner, James Warburton, was tried before me at the Summer Assizes, held in 1870, for the West Riding of Yorkshire, at Leeds, upon a charge of conspiracy.

The indictment charged, amongst other counts, that the prisoner had unlawfully conspired with one Joseph Warburton

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and one W. H. Pepys, by divers subtle means and devices, to cheat and defraud the prosecutor, S. C. Lister.

It appeared in evidence that the prisoner and Lister were in 1864 in partnership, and carried on a part of the partnership business at Urbigan, in Saxony, by there selling patent machines; that the prisoner had given notice, according to the terms of the partnership agreement, for a dissolution of the partnership between himself and Lister; and that upon such dissolution an account was to be taken, according to the partnership agreement, of the partnership property; and that according to it such property would be divided on such dissolution in certain proportions between the prisoner and Lister, after payment of partnership liabilities; and that the prisoner, in order to cheat Lister, had agreed with his brother Joseph Warburton, who managed the partnership business at Urbigan, and with W. H. Pepys, a friend of the prisoner residing at Cologne, to make it appear by documents, purporting to have passed between Pepys and Joseph Warburton, and by entries in the partnership books of accounts, made under the superintendence of Joseph Warburton, that Pepys was a creditor of the firm for moneys advanced; and that by reason of such documents and entries certain partnership property was to be withdrawn, and to be handed to Pepys, or otherwise abstracted or kept back, so as to be divided between the prisoner and Joseph Warburton and Pepys to the exclusion of Lister from any interest or advantage in or from or in respect of it.

The jury, upon this evidence, found the prisoner guilty of the conspiracy charged; and I think rightly so found, if in point of law such an agreement made by a partner with such an intent to defraud his partner of partnership property, and to exclude him entirely from any interest in or advantage from it on such occasion, that is to say, on the taking of an account for the purpose of dividing the partnership property on a dissolution of the partnership by means of false entries in the partnership books, and false documents, purporting to have passed with a supposed creditor of the firm, is a conspiracy contrary to law, for which a prisoner can be criminally convicted.

The offence, if it be one, was fully committed and completed before the passing of the statute by which a partner can be criminally convicted for feloniously stealing partnership property.

I request the opinion of the Court of Criminal Appeal whether the verdict found in the case upon the evidence so stated, assuming such verdict to be correct in point of fact, can be sustained so as to support a conviction for conspiracy in point of law.

If it can be, the conviction to be affirmed; if it cannot, the conviction to be set aside. I reserved the sentence to be passed on the prisoner.

WM. BALIOL BRETT.

*Wauldy* (*Whitaker* with him) for the prisoner.—The conviction was wrong, for the conspiracy proved was not one punishable by

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the criminal law, however immoral and injurious to the prisoner's partner, Lister. A conspiracy is defined by the criminal law to be either a combination to do an illegal act, or to do a legal act by illegal means. In this case the act done was not illegal, as it was a mere dealing with the partnership property, and was complete before the 31 & 32 Vict. c. 116, which makes a partner criminally liable for converting to his own use the property of the co-partnership; and the means resorted to were not illegal. The rule may be stated from 2 Lindley on Partnership, p. 856: "There is no method by which an ordinary firm can sue or be sued by any of its members either at law or in equity; for the firm, as distinguished from the persons composing it, has no juridical existence. All proceedings, therefore, which have for their object the enforcement of the mutual rights and obligations of partners, must be taken by some or one of the members of a firm individually, against some others or other of them also individually. The consequences of this rule are important, for it follows from it; first, that no action at law can be brought by one partner against another for the recovery of money or property payable to the firm as distinguished from the partner suing; secondly, that no criminal prosecution is sustainable by one partner against another for what he may do with the property of the firm." [BRETT, J.—That is when one partner is acting alone, not when he is acting with other persons in defrauding the firm.] In *Reg. v. Evans* (9 Cox Crim. Cas. 238; 1 L. & C. 252), a partner who misrepresented the partnership accounts, and thereby obtained more than his share of money, was held not liable to conviction for obtaining money under false pretences. Here it is submitted that there was no attempt to do an illegal thing. Secondly, this was not a conspiracy to do an act by illegal means, *i.e.*, availing himself of the assistance of another person to effect the purpose. If, in contemplation of law, he alone could not be prosecuted for what he might do with the partnership property, how can he become criminally liable for doing the same thing in concert with another person? [COCKBURN, C.J.—Here the conspiracy was formed while the partnership existed, but the object was that it should not take effect until after the partnership had ceased and the distribution of assets was to take place.] Here what was done was that the books were tampered with to conceal the fact that partnership funds had been taken by the prisoner. And to further such concealment the prisoner co-operates with another person. This, it is submitted, did not make him criminally liable. [COCKBURN, C.J.—It is true that in point of law both partners were possessed *per my et per tout* of all the partnership property, but at the moment of dissolution of the partnership, each partner's share became distinct and separate. If a conspiracy is formed to effect an undue division of the partnership assets after the dissolution, it is a criminal offence though the conspiracy may have been formed during the existence of the partnership. The object of the conspiracy is for effecting an



undue division of the partnership property, which is not to take effect until after the dissolution of the partnership.] Here the prisoner gave notice to dissolve the partnership, but nothing was done upon that notice, and in point of fact the partnership was broken up by the prosecutor taking forcible possession. A man cannot be liable for procuring another person to assist him in the way stated in the case. There is no decided authority at all analogous. [BRETT, J.—It is not a criminal offence for a man to misrepresent his circumstances for the purpose of procuring a woman to marry him, but if he and another person conspire to procure a marriage by such means, I apprehend it is a criminal offence.](a) In *Pasley v. Freeman* (3 T.R.51), Buller, J., said: “In the case of a conspiracy there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence which if practised by two would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured.” Here the prisoner may have been liable to an action for damages, but not to an indictment for conspiracy.

*Maule*, Q.C. (*Nathan* with him), for the prosecution, was not called upon to argue.

COCKBURN, C.J.—I am clearly of opinion that this conviction was right. There may be a doubt whether the law of England is consistent in saying that what is not criminal in one man alone is criminal when done by two men. This, however, is not a case in which it is desirable to put any restriction on the rules of law relating to conspiracy. A conspiracy is an offence when two or more persons combine to injure another by fraud. It is enough if the object is unlawful and a wrong done. In this case the only doubt that could arise is whether the conspiracy had reference to the division of the partnership property on the dissolution of the partnership, and to the share of the assets which each partner had then a right to expect. It is clear that there was a wrong intended by the prisoner against his partner, and that he intended to deprive him of the share of the partnership property to which he was entitled according to the partnership agreement. The case, therefore, falls within the definition of conspiracy—a combination of two or more persons for the purpose of injuring another. In the case referred to by my brother Brett,(a) Lord Mansfield laid it down that, although an act when done by one man alone might not be indictable, yet when two combine to do it, it might become the subject of conspiracy. The present case falls within that rule and the conviction will be affirmed.

The other JUDGES concurred.

*Conviction affirmed.*

(a) The name of the case was not mentioned, but probably *Rex v. Delaval* (3 Burr. 1435) was intended.

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## COURT OF CRIMINAL APPEAL.

Nov. 12, 1870.

(Before COCKBURN, C.J., CHANNEL, B., KEATING, J., BRETT, J.,  
and CLEASBY, B.)

REG. v. HOWARTH. (a)

*False pretences—What is—Indictment—Evidence.**An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad.**The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T. and induced prosecutor to part with goods on the representation that he had just come from abroad and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T. and was going to furnish it :**Held, that the false pretences charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction.*

CASE reserved for the opinion of this Court by the Court of Quarter Sessions of the peace, held at Maidstone, in and for the County of Kent, on the 1st July, 1870.

The prisoner, Thomas Horatio Howarth, was tried on the following indictment for obtaining a quantity of wine from one Samuel Ridley Searle, by a false pretence.

Kent, } The jurors of our Lady the Queen upon their oath  
to wit. } present, that Thomas Horatio Howarth, late of the  
parish of Tunbridge, in the county of Kent, on the 14th of May,  
1870, at the parish aforesaid, unlawfully and knowingly did falsely  
pretend to Samuel Ridley Searle that he, the said Thomas Horatio  
Howarth, had taken a house in Tunbridge Wells, that Mr. Booty  
was going to furnish it for him, that he, the said Thomas Horatio  
Howarth, had got a carriage and pair, and expected it down either  
that day or the next, and that he had large property abroad; by  
means of which said false pretences the said Thomas Horatio  
Howarth then unlawfully did obtain from the said Samuel Ridley

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Searle six quarts of sherry wine, six quarts of port wine, and twenty-four bottles of the goods and chattels of the said Samuel Ridley Searle, with intent to defraud. Whereas, in truth and in fact, the said Thomas Horatio Howarth had not taken a house in Tunbridge Wells, Mr. Booty was not going to furnish it for him, and he, the said Thomas Horatio Howarth had not got a carriage and pair, nor had he any property abroad, as he, the said Thomas Horatio Howarth, then well knew, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

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The following evidence was given on the trial:—

Samuel Ridley Searle was sworn and said: I am a wine merchant at High-street, Tunbridge Wells. I remember prisoner coming to my shop on Thursday, the 12th of May. He told me he was lodging at Alexandra-place, Tunbridge Wells. He said he should require some wine to be sent in on Saturday for Sunday, as he said he had some friends coming to see him. He gave his name T. H. Howarth, and said he had taken a large house at Tunbridge Wells, from Jull and May, house agents. He said he expected his carriage and pair down. He also said he had ordered furniture from Mr. Booty. He said he had just come from Paraguay, and that he had just shipped a large quantity of wine to Rio de Janeiro from England. On Saturday he called again and told me to send wine in. I sent two dozen of wine. He said he should pay cash, but he did not. I let him have it because he represented to me he was a wealthy man. Under other circumstances I should not have done so.

Martin Skinner was sworn and said: I am clerk to Jull and May, house agents, Tunbridge Wells. On the 12th of May prisoner called in the morning. He came and asked for a house. He had agreed to take a house. He said a reference should be given as soon as the draft of lease was ready. He said he would not refer to his friends, but would give any amount of money for security. I never got any money from him. I never saw the carriage and pair which prisoner spoke of. I have not sent draft of lease.

John Joseph Emery was sworn and said: I am superintendent of the Tunbridge Wells police. I had been keeping watch upon prisoner for three or four days. On Sunday the 15th of May I went to prisoner's lodgings in Alexandra-place. I saw prisoner and asked for his name. He gave his name and asked what I wanted to know for. I said, "I believe you are the man who has been passing as C. A. De Courcy, at Eastbourne, and swindling tradesmen there." He said he had never been at Eastbourne in his life. I said, "I am positive you are the man; if so, you have a scar under your right eye." I turned him round to the light and said "There it is." He said "What do you want?" I said, "Your landlord charges you with getting food and lodging by false pretences, and Mr. Searle also charges you with getting two

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dozen of wine by false pretences." He said, he "would go with me—why did you not take me before?" He asked me what was the false pretence? I said that it would be by representing himself as being a person of position, talking about horses and carriages and a banking account. I said, "Two or three days ago you were at Eastbourne under an entirely different name." I then took him into custody. On the way to the police station he said, "I am very glad you have taken me. Why did you not take me before? I feel happier now. I shall know the end of it. My friends are to blame, not me; they would not assist me." I said, "You had a narrow escape at Eastbourne?" he said, "Yes, I did. I have sent to my friends for some money, and shall bring an action against the landlord for hiring a gang of roughs to pelt me." I can find nothing of a carriage and pair. I have made inquiries about them.

Henry Carter was sworn and said: I am landlord of the Burlington Hotel, Eastbourne. Prisoner came to my house on the 9th of May. I wrote to him a letter on that day; in consequence prisoner sent for me. He was known by name of C. A. De Courcy. He had no luggage. I told him it was usual when a gentleman arrived without luggage to place a deposit of money. He said it was a pity I had not told him sooner, or he would have given it. But in the morning he said he would go to the banking house, change a cheque, and pay me. I allowed him to stop the night. I said I had telegraphed to the Grand Hotel, Brighton, to know whether he had been staying there, or whether Lord Alfred de Courcy had been staying there. He took rooms for him (Lord Alfred de Courcy) and stabling for his five horses on the following day, and arranged with the proprietor of mews to drive him (Lord Alfred de Courcy) over to Hastings. On the next morning I waited for him at the coffee-room door of my hotel. I said in consequence of the telegram I had received he could have no further accommodation in my house. He asked for his boots, and said he would go to the bank and get a cheque, and settle with me. I told him in these days everybody took a material guarantee, and I should not let him have his boots. I took a ring from him, and told him his boots were worth a bushel of such things, and I might as well keep that. He again talked about Lord A. De Courcy. I let him have his boots, and I went with him to the Lewes Bank in Eastbourne, and waited till the bank opened. He said he had sent a telegram to some bank. I went again with him about twelve the same day (I never lost sight of him). I saw the manager of the bank. A telegram had been received; there was 1s. to pay. The manager of the bank asked prisoner for 1s. He said he had not got 1s. The manager said before he opened the telegram prisoner must pay 1s. The manager eventually paid. Prisoner told me he could not pay my bill. He told Mr. Bradford and another man the same as to their bills. He was pelted out of the town.

No witnesses were called for the defence.

At the close of the case for the prosecution, the counsel for the Crown admitted that he could not support those parts of the false pretence which charged that the prisoner had said he had taken a house in Tunbridge Wells, and that Mr. Booty was going to furnish it for him.

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The counsel for the prisoner then objected, and contended that there was no case at all to be left to the jury, and that the Court ought to direct the jury to acquit the prisoner on the ground: as to the third branch of the false pretence about the carriage and pair; first, that there was no evidence to negative that part of the pretence; secondly, because it was a promise of something in future; and as to the fourth branch of the false pretence about the prisoner's having large property abroad: first, that there was no evidence that the prisoner had made any such pretence; secondly, even if he had made such a pretence, that there was no evidence to negative it.

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The chairman declined to withdraw the case from the jury, but told them that it was not necessary to prove the whole of the pretences charged, but that proof of part of the pretences, and that the goods were obtained by such part, was sufficient.

The jury found the prisoner guilty, and the Court sentenced him to eighteen calendar months imprisonment with hard labour in the house of correction at Maidstone, but reserved for the consideration of the Justices of either Bench and Barons of the Exchequer, the question whether, by reason of the objections taken by the counsel for the prisoner, the Court ought to have withdrawn the case from the jury and directed an acquittal.

If the Court ought to have directed an acquittal, then the conviction is to be quashed, if not, it is to be affirmed.

Execution of the judgment was respited until the determination of the question reserved, and the prisoner was committed to prison, but the court ordered that he might be discharged on entering into a recognisance, himself in 100*l.*, and two sureties in 50*l.* each, conditioned for the prisoner's appearing and rendering himself in execution if the conviction should be affirmed.

JOHN G. TALBOT,

Chairman of the said Court of Quarter Sessions.

*Ribton*, for the prisoner.—The conviction should be quashed, for the chairman ought to have told the jury that there was no evidence to support the second and third false pretences charged. The case, as regards the first false pretence, was withdrawn by the counsel for the prosecution, and the evidence did not sustain either of the other two charges. The second false pretence, that the prisoner had got a carriage, and expected it down either that day or the next, is very vague. The prosecutor was bound to show that it was untrue, and there was no evidence that the prisoner had not got a carriage. Then as to his expecting it down, that is something *in futuro*; and who can say that he did not expect a carriage down? [COCKBURN, C.J.—It is just pos-

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sible he may have expected it, but might not the jury infer from all the facts that it was a mere false pretence?] The third false pretence alleged is that he had a large property abroad. The evidence of what occurred at Eastbourne was, it is submitted, inadmissible, but if admissible could not be taken as proving that the prisoner had no property abroad. [KEATING, J.—Evidence of what occurred at Eastbourne on the 9th of May was material, as the prisoner was then in a destitute condition, and it would have been very strange if he were in an affluent condition three days afterwards at Tunbridge.] Besides, there was no evidence that the prisoner made any such pretence. [BRETT, J.—There was just as much evidence as in the case of the person at Oxford who assumed a commoner's gown and cap, and thereby obtained goods: (*Reg. v. Barnard*, 7 C. & P. 784).]

No counsel appeared for the prosecution.

COCKBURN, C.J.—I think that the conviction was good, and must be upheld. This was an indictment for obtaining goods by false pretences, and three false pretences are charged: First, that the prisoner had taken a house at Tunbridge Wells, and that Mr. Booty was going to furnish it for him; secondly, that the prisoner had got a carriage and pair and expected it down either that day or the next; thirdly, that he had a large property abroad. The evidence was that the prisoner had represented that he had just come from abroad, and that he had just shipped a large quantity of wine to Rio de Janeiro from England; that he had taken a large house at Tunbridge Wells; that he expected his carriage and pair down; in short, that he was a man of wealth, and had come to settle at Tunbridge Wells. At the close of the case for the prosecution, as there had been some negotiation for taking and furnishing a house, the counsel for the prosecution abandoned the first charge of false pretences. It was then objected by the prisoner's counsel that there was no evidence to negative the pretence that the prisoner had a carriage and pair, and that the allegation that he expected it down in a day or two was like a promise *in futuro*, and was not in point of law a false pretence. The pretence that the prisoner had got a carriage and pair, and that he expected it down that day or the next, is a sufficient false pretence. Then it was said that there was not evidence to negative that pretence. It is true there was no direct evidence, but from all the facts of the case, what occurred at Eastbourne, and at the bank there, and his representation that he had just been shipping wine to Rio de Janeiro, the jury might well infer that the pretences were false, and it is quite sufficient that the prosecutor was induced thereby to part with his goods. The conviction will therefore be affirmed.

The rest of the COURT concurred.

*Conviction affirmed.*



## COURT OF CRIMINAL APPEAL.

Nov. 19, 1870.

(Before KELLY, C.B., CHANNELL, B., KEATING, J., BRETT, J.,  
and CLEASBY, B.)

REG. v. HENDERSON.(a)

*Bailee—Deposit or sale—Fraudulent conversion—  
24 & 25 Vict. c. 96, s. 3.*

*A. delivered two brooches to the prisoner to sell for him at 200l. for one, and 115l. for the other, and the prisoner was to have them for a week for that purpose; but two or three days' grace might be allowed. After ten days had elapsed, the prisoner sold them, with other jewellery, for 250l., but arranged with the vendee that he might redeem the brooches for 110l. before September: Held, that this amounted to a fraudulent conversion of the brooches to his own use by a bailee within 24 & 25 Vict. c. 96, s. 3.*

CASE stated by the Recorder of Southampton.

George Henry Henderson was tried before me, as the Recorder of the town and county of the town of Southampton, at the Sessions holden on the 19th of July, 1870, on an indictment drawn as follows:—

Borough of Southampton and County of the } The jurors for  
Town of Southampton, to wit. } our Lady the  
Queen on their oath present, that George Henry Henderson, on the 29th of June, 1870, two diamond brooches of the goods and chattels of Alexander Alexander and Alexander Samuel Pyke, feloniously did steal, take, and carry away, against the peace of our Lady the Queen, her crown and dignity.

The evidence material to the point raised in this case was as follows:

Alexander Samuel Pyke: I am a jeweller in Hatton-garden, London. On June 16th I saw prisoner at Dolphin Hotel, Southampton. I sold him jewellery to the amount of 393l. After the purchase had taken place I showed him two diamond brooches. I said, "Do you think you could sell these two brooches?" He

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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pondered five or ten minutes, and then said, "I have two or three customers to whom I could show them." I said, "You understand this will have nothing to do with our general transaction, and if you do anything with these brooches you will have to return either the cash or the brooches." I said, "The original price is 235*l.* for one, and 150*l.* for the other, but as this is a special transaction I will take 200*l.* for one and 115*l.* for the other." I said, "You shall have them for a week, but two or three days' grace might be allowed." I delivered the two brooches to him.

Charles Keene.—I am assistant to Messrs. Attenborough, pawnbrokers, in the Strand. Prisoner came to me on June 29th, he produced two diamond brooches, he said he wished to raise money on them by selling them. He had money on them. He sold other jewellery, and had 250*l.* on the whole, including the brooches. After he had raised the money, he said he wished to be able to redeem the brooches. I said he could redeem them on payment of 110*l.*, and that we would not part with the goods until September.

The counsel for the prisoner contended that the dealings between him and Mr. Pyke constituted a contract for the sale of the brooches, and was not merely a bailment of them for a particular purpose, but, if it was such a bailment, that, inasmuch as the prisoner was not bound to return the specific brooches, but might have paid over to Mr. Pyke the cash he might receive for them, he could not be convicted on the above indictment.

I left two questions to the jury; first, was the transaction between the prisoner and Mr. Pyke a contract for the sale of the brooches, or a delivery of them to him for a particular purpose; and secondly, did the prisoner intend, at the time of his raising the money on them, to resume possession of them so as to fulfil the purpose for which they were intrusted to him, or had he by his conduct put out of his power the carrying out of such purpose? directing them to find him guilty if they were of opinion that it was a delivery for a special purpose and not a sale, and if they thought he had put out of his power the carrying out of such purpose. The jury found him guilty, finding that there was a delivery for a special purpose, and also a putting out of his power the carrying out of such purpose.

At the request of his counsel, I reserved this case for the consideration of the Court for Crown Cases Reserved.

The question for the court is whether, inasmuch as the prisoner was not bound to return the specific articles intrusted to him, he can or cannot be convicted upon this indictment?

MONTAGUE BERE.

*F. Turner*, for the prisoner.—The conviction cannot be sustained. This was a contract of sale or return. The prisoner had the option of returning the brooches, or the price agreed upon for them. [BRETT, J.—Was not the prisoner rather an agent

for sale, having possession of the goods ?] No, considering how the parties were dealing. The prisoner was not bound to return these goods ; he might have paid to the prosecutor the sum agreed upon for them. In *Reg. v. Hassall* (L. & C. 58; 8 Cox Crim. Cas. 491) it was decided that a person who holds money for another under an obligation to give back the amount deposited at a specified time, but who is not bound to return the specific coins which he has received, is not indictable as a bailee under the statute. The authority to sell was not at an end when the limited number of days expired. After the expiration of that time the prosecutor might have sued the prisoner for the price of the brooches as upon an absolute sale : (*Moss v. Sweet*, 16 Q. B. 493 ; 20 L. J. 167, Q. B.) The following cases show that the prisoner was not liable to be indicted as a bailee : *Reg. v. Hoare* (1 Fost. & Fin. 647,) and *Reg. v. Garratt* (8 Cox Crim. Cas. 368).

*Macrae Moir*, for the prosecution, was not called upon.

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KELLY, C. B.—We are all of opinion that this conviction should be affirmed. It is necessary to consider, in the first place, what was the state of things which existed as regards these two brooches. The effect of the statement of facts in the case is this : The prosecutor delivered the two brooches to the prisoner for the purpose of being sold by him for the prosecutor upon these terms : The prisoner was to sell them for not less than 200*l.* for one, and 115*l.* for the other ; and the second limitation was, that he was to sell them within a week, or at the most within ten days ; if he could sell them for these prices, his duty was to pay over the price he received to the prosecutor ; and if he was unable to sell them, his duty was, when the ten days had expired, to return the two brooches in specie to the prosecutor. The prisoner having received the brooches on these terms, and the ten days having elapsed, and the brooches being unsold, his duty was simply to return them to the prosecutor, for the property of the prosecutor in the brooches never ceased until the prisoner sold them to another person. The prisoner, however, proceeded to a pawnbroker's shop and effected a sale to another jeweller. No doubt he raised money upon them *primâ facie* as a pledge, but the subsequent words show that it was really by means of a sale. The act he did was to sell the brooches with other property for 250*l.*, and then he stipulated that he might redeem the brooches on payment of 110*l.* before September. The question is whether this transaction was a conversion of the brooches to his own use ? He being a bailee of them at common law it would not amount to a larceny ; but I am of opinion that it does amount to a conversion by a bailee to his own use, under sect. 3 of the 24 & 25 Vict. c. 96, if it was a fraudulent taking or converting by the prisoner. When the ten days had expired there can be no doubt that the prisoner held the brooches on no other condition than to return them to the prosecutor ; and I think that the converting of them to his own use, by sale or pledge, after that, was a fraudulent

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taking and converting of them to his own use within the meaning of sect. 3. This view is supported by the finding of the jury on the first question put to them, that the transaction was not a contract of sale of the brooches to the prisoner, but a delivery of them to him for a particular purpose, viz., to be sold by him for the prosecutor within ten days. In leaving the second question to the jury, the case was put too favourably for the prisoner. The second question left to the jury was, did the prisoner intend, at the time of his raising the money on the brooches, to resume possession of them, so as to fulfil the purpose for which they were entrusted to him, i.e., return them in specie to the prosecutor? If he did not, the act was fraudulent. If he did so intend, whether such intention takes the case out of the 3rd section, is another question, and does not arise in this case. If he sold the brooches without the intention of repossessing himself of them, so as to fulfil his duty, he was guilty of the larceny charged in the indictment. The jury must be taken to have found that he did not intend to repossess himself of them; the act of sale was therefore, in itself, a fraudulent applying of the brooches to his own use, and a larceny within the statute. The question reserved for us assumes something which is not the case—that the prisoner was not bound to restore the specific articles—whereas, after the ten days had elapsed, he was bound to return the specific brooches to the prosecutor. The conviction will be affirmed.

The other JUDGES concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

Nov. 19, 1870.

(Before KELLY, C.B., CHANNELL, B., KEATING, J., BRETT, J.,  
and CLEASBY, B.)

REG. v. HAZELL.(a)

*Larceny—Obtaining property by a trick.*

*The prosecutor met a man and walked with him. During the walk the man picked up a purse which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner, who opened it, and there appeared to be about 40l. in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public-house and had some drink. Prisoner then showed some money and said, if the man would let him have 10l., and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be 10l. in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the 10l. back and 5l. more. Prisoner then said he would do the same for the prosecutor, and by that means obtained 3l. in gold and the prosecutor's watch and chain from him. The prisoner and the man then left the public-house, and made off with the 3l. and the watch and chain. At the trial, the prosecutor said he handed the 3l. and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him 5l. :*

*Held, that the prisoner was properly convicted of larceny upon this evidence.*

CASE reserved for the opinion of this Court at the Surrey Sessions :

At the General Quarter Session of the peace holden by adjournment at St. Mary, Newington, in and for the county of Surrey, on the 4th of August, 1870, William Hazell was tried and convicted of feloniously stealing 3l. in money, one watch, and one watchguard chain, of the property of Joseph Edward Pulley, upon the following evidence :—

Joseph Edward Pulley, being sworn, on his examination-in-chief, said : I am a dyer, and live at Louth. On the 24th of May I was in the Green-park. I was very ill from bad eyes. I

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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met a man, who said he was from Liverpool. He asked me if I could tell him where the Guards' band played? I told him that I was going that way, and if he had no objection, he could accompany me down there. We went to the Cloisters, Westminster. It was between eleven and twelve o'clock in the day. The man stooped down all of a sudden and picked up a purse. He said, "This is a lucky find, is it not?" I asked him what it was? He said it was a purse. I asked him where he got it? He said he picked it up down there. I did not see him pick it up. I asked if he saw who dropped it. He pointed to prisoner, and said he was the person who dropped it. I told the man he had better restore it to him. We both of us went to him and said he had dropped his purse. He seemed much surprised. He opened it to see that his money was all right. There appeared to be about 40*l.* in gold. Prisoner related the manner in which he became possessed of this money. He said he was an architect from Gloucestershire. He had been doing work for the contractor for some work at the House of Commons, and had given great satisfaction. He appeared to be very grateful, and said he would reward us for our honesty with something which he would purchase at a shop—not with money. We left the Cloisters, and went to Lambeth-bridge. I pointed towards Westminster-road, and said there are some shops down there if you wish to make us a present. He preferred going up Church-street. When we got to the Crown Tavern, Church-street, he said we must go in there and have a glass of ale. We went in. Prisoner ordered a pint of ale and a bottle of ginger beer. I told him I did not drink anything; drink affected my eyes. We went into a room, and we three were alone. I sat between the two men. The man said if he had a little of his money it would do him good, as he came from Liverpool to buy a business and he was rather short of money. Prisoner showed some money, and said if he would let him have 10*l.* and let him go out of his sight he would not say what he would give him. The third man handed to prisoner what appeared to be a 5*l.* note and five sovereigns. Prisoner and I went out together; when he got outside he said "He is a funny or a fine fellow to let me have 10*l.* out of his sight, I will give him 5*l.* when I get back." He gave him his 10*l.* back and what appeared to be five sovereigns. The third man said he should not make fish of one and flesh of the other. Prisoner then said he would do the same for me. I said I had not 10*l.* Prisoner asked me to let him see what I had. I showed 3*l.* He took the 3*l.* in his hand (six half sovereigns), and said, I am not going to give you 5*l.* upon 3*l.* The third man closed up to me and said, "Let him have your watch and chain, which will make it up to the value of 10*l.*" I let prisoner have the watch and chain, value 8*l.* or 9*l.*, and the 3*l.* They left the room. As soon as the door was shut I went after them. I could not see either of them. I gave information to the police. Five weeks after, on the 27th of June, I saw prisoner in St. James's-park. I followed him and



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gave him in charge. As he was going over the bridge he threw something over the bridge which appeared to be a letter, and something in a dark paper. In the early part of last month I was in the Ophthalmic Hospital. Some person called to see me there; two men called. One was Henry Hazell, prisoner's brother. I received my money and watch and chain back. A woman brought them in and gave them to Henry Hazell, who gave them to me. Henry Hazell was given in charge at the hospital.

On cross-examination the said Joseph Edward Pulley said: I handed these things over in terror. I never thought I should get the 5*l.*; I was afraid they were going to do something to me. I had no confidence that they would give me 5*l.* I did not believe that I should have 5*l.*

On re-examination he said "Prisoner said he would give me 5*l.*"

John Ashley, 184 C, said: I apprehended Henry Hazell outside the hospital. I produce the watch and chain, which I received from the prosecutor.

Benjamin Hirons, 184 A, said: I apprehended prisoner on the 27th of June in St. James's-park, and asked him if he knew what he was charged with. He said he did not know prosecutor at all.

The said Joseph Edward Pulley, being recalled, said: I never before stated that I parted with my property under terror. No one waved a pocket handkerchief. I have read of cases in the newspapers. They did nothing to frighten me, but one sat on one side and the other on the other side, and looked me in the face.

Counsel for the prisoner submitted there was no case, but the Court left the case to the jury, directing them that if they were satisfied that the prisoner obtained possession of the prosecutor's property by means of a trick or artifice with intent to deprive him thereof, or that if they were satisfied that the prosecutor parted with his property under the influence of fear produced by the conduct of the prisoner and his confederate, they should find the prisoner guilty.

The jury returned a verdict of guilty, and the court reserved for the decision of this Court the question whether upon the above-mentioned evidence the prisoner could properly be convicted of larceny.

The Court respited judgment and committed the prisoner to the common gaol at Newington until the decision of this court should be known.

*Note.*—Henry Hazell was bailed to answer the charge of being an accessory after the fact to the larceny committed by William Hazell, but did not surrender.

E. RICHARDS ADAMS, Chairman.

*Metcalf*, for the prisoner, said he had looked into the authorities, and could not support the objection.

KELLY, C.B.—I suppose after the case of *Reg. v. M'Grath* (11 Cox Crim. Cas. 347; 39 L. J. 7, M. C.; 21 L. T. Rep. N. S. 543) you find the point untenable.

*Keogh*, for the prosecution.

*Conviction affirmed.*

## MIDDLESEX SESSIONS.

*August 29, 1870.*

(Before Mr. Serjt. Cox, Deputy-Assistant Judge.)

REG. v. CARPENTER.

*False pretences—Evidence.*

*Prisoner was indicted for obtaining from George Hislop, the master of the Workhouse of the Strand Union, one pint of milk and one egg, by falsely pretending that a certain child then brought by him had been by him found in Leicester-square, whereas, &c.*

*The facts were that the prisoner was waiter at an hotel in George-street, Hanover-square. A female servant there, named Spires, had been delivered of a child by him, which was put out to nurse. The child falling ill, the nurse brought it to the hotel, and the prisoner, saying that he would find another nurse, took the woman with him to Westminster, where the nurse put the child into his arms and went away. He took it to the workhouse of St. Martin's-in-the-Fields, which is in the Strand Union, and delivered it to the master, stating that he had found it in Leicester-square. It was by the master delivered to the nurse to be taken care of, and the nurse fed it with the pint of milk and egg, which was the subject of the charge in the indictment as the property obtained by the false pretence alleged.*

*Held, that this evidence did not sustain the indictment. First, because the child not having been affiliated there was no legal obligation on the prisoner to maintain it, and therefore for the purposes of this indictment it must be treated as if a stranger had put a strange child in his arms, when it would have been rightly delivered by him to the relieving officer; secondly, that even if there had been a sufficient false pretence, the milk and egg given to the child, not at the prisoner's request, but by the workhouse matron in the course of her duty, was too remote to be an obtaining of such food by him.*

**I**NDICTMENT for obtaining by false pretences from the master of the workhouse of St. Martin-in-the-Fields one pint of milk and one egg.

The facts proved were, that a chambermaid, at an hotel in George-street, Hanover-square, had a child, as she alleged, by the prisoner, who was a waiter there. She had not affiliated it to him, nor had he contributed to its maintenance, but the

mother had put the child to nurse. The child falling ill, the nurse became alarmed, and carried it to the hotel, where she saw the prisoner, and asked to see the mother, but the prisoner said she was engaged, and that he would find another nurse for it. Taking the woman with him, he went through several streets, the woman carrying the child; but when near Westminster Bridge, she refused to go any further, placed the child in the prisoner's arms, and walked away. The prisoner took the child to the relieving officer of St. Martin's-in-the-Fields, saying that he had picked it up in Leicester-square. Believing the prisoner's statement, the master sent for the matron, who took the child in charge, and fed it with the milk and egg which were the subject of the indictment. The prisoner went away. Afterwards it was discovered that the story as to the finding of the child was false, and these proceedings were taken against him. The master of the workhouse swore that he gave the child to the matron to take care of it, believing the prisoner's statement that he had found it. Neither the place where the child was born, nor that where it was put into the prisoner's arms by the nurse, was in the Strand union.

At the close of the case for the prosecution,

The JUDGE said: How is this charge to be sustained? There was a false pretence, it is true; but how is it contended that the prisoner obtained any money, goods, or chattels by reason of that false pretence? The child had not been affiliated to him, and he was for all legal purposes a stranger to it. When placed by the nurse in his arms, it was abandoned by her, and it was his duty to take it to some workhouse. It had been as completely abandoned in point of law by being placed in his arms against his will as if it had been thrown into the gutter. He had, therefore, a clear right to deliver it to some union. It is a question of no small difficulty whether it should have been carried to the union in which it was born or in which it was abandoned, and it would be hard to imply criminality from a choice of the wrong union. Few persons in Parliament-street could tell in what union they were standing, and St. Martin's-in-the-Fields would at once suggest itself as apparently the nearest workhouse. The prisoner, indeed, told a lie as to the means by which he had obtained his unwelcome burden, but probably there is not a man in the court who would have told the truth in such circumstances. But that is not the only answer to this charge. The child being in contemplation of law a stranger to the prisoner, he being under no obligation to maintain it, relief given to the child was not relief given to him. He did not ask for a pint of milk and an egg either for the child or for himself, and it was in truth given to the child, not because of the prisoner's statement, but because it was the duty of the parish to feed a child in its custody. The prisoner acted very wrongly in telling a lie and throwing his child, if it is really his, upon the parish; but he is not guilty of the indictable offence of obtaining by false pretences the food given to the child.

*Not guilty.*

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—*Evidence.*

## MIDDLESEX SESSIONS.

August 30, 1870.

(Before Mr. Serjt. Cox, Deputy-Assistant Judge).

REG. v. LOVETT.

*Forfeiture for Felony Act, 1870, s. 4—Compensation.*

*Sect. 4 of the Forfeiture for Felony Act, 1870 (33 & 34 Vict. c. 23), which empowers the court to award any sum of money not exceeding 100l., by way of satisfaction or compensation for any loss of property suffered by the applicant through or by reason of the said felony, such sum to be "deemed a judgment-debt to the person entitled to receive the same from the person so convicted," requires to be exercised with considerable caution, as being liable to abuse by arrangements in the nature of condonation of a felony.*

*On an indictment of a servant for stealing money from his master, it had been arranged between the counsel for the prisoner and the prosecutor that the prisoner should repay the money he had stolen, and that prosecutor should recommend that he be discharged, without punishment, on his own recognisances to come up for judgment when called upon, and that the court should order that sum to be paid as compensation to the prosecutor under sect. 4.*

*The prisoner having pleaded guilty to the charge, an application was made by counsel, stating the above arrangement. But the Court refused its assent to any compromise, as not being within the intention of this provision of the Act, which contemplated compensation to the party wronged, as an addition to, and not as a substitute for, the punishment due to the crime.*

THE prisoner was indicted for stealing 5l. 10s. in money, the property of his employers, Messrs. Marshall and Snelgrove. He pleaded guilty.

*Besley* for the prosecutor.

*Ribton* for the prisoner.

*Besley* said that, the prisoner having pleaded guilty, he had now on the part of the prosecution to recommend him to mercy. Prisoner had engaged to refund the money he had taken, and he applied to the Court to exercise for the first time the power given to it by the 4th section of the Forfeiture for Felonies Act of the

last session, and to make a formal order for compensation to the prosecutors of the money taken from them. This was precisely the case contemplated by the statute, and he would ask the Court, in consideration of this undertaking by the prisoner, to inflict no punishment, but to order that he come up for judgment if called upon, which he might be if he did not fulfil his promise to repay the sum he had taken.

*Ribton*, for the prisoner, said that such had been the arrangement which had been made on the prisoner's behalf, and he hoped it would have the approval of the Court.

The JUDGE.—Certainly not. So far from being a course contemplated by the new statute, I am satisfied that no such view of it could have been designed by the Legislature. The section before me could not have been intended to introduce or sanction what would be in fact a condonation of a felony, and this would obviously be the result if the court were to permit such an arrangement between the prosecutor and the prisoner as that now proposed. No such inference could fairly be drawn from the language of the statute. It empowers the Court "immediately after the conviction of any person for felony, to award any sum of money, not exceeding 100*l.*, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, the amount so awarded to be deemed as a judgment-debt from the person entitled to receive the same from the person so convicted." This was manifestly designed to be in the nature of a remedy for the wrong done to the individual, and to be in addition to, and not as a substitute for, the punishment due to the crime. If compromises of this nature were to be permitted, they would be in direct defiance of the law that prohibits the condonation of a felony, and it would be open to many grave abuses. It was a power to be exercised with the utmost caution, and especially with a view to the possibility of such an abuse of it. I cannot accede to the application; but, taking into consideration the strong recommendation to mercy by the prosecutors, the prisoner's previous good character, and the circumstances attending the commission of the crime, I shall not inflict the punishment usually given to servants for robbing their employers, but reduce it to imprisonment for two months.

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## PRIVY COUNCIL.

*July 7, 1870.*

(Present: The Right Hon. Lord CAIENS, Sir WILLIAM ERLE,  
and Sir JAMES W. COLVILE.)

REG. v. ALLAN MACPHERSON. (a)

*Assault—Pleading—Surplusage.*

*To an information, charging a common assault, the words were added "in contempt of the Legislative Assembly, in violation of its dignity, and to the great obstruction of its business." On demurrer,*

*Held (reversing the judgment of the Supreme Court of New South Wales), that the information was good; the words added not being an allegation of a further or separate offence, but being simply a statement of the consequence resulting from the common assault charged in the earlier part of the information.*

THIS was an appeal from the judgment of the Supreme Court of New South Wales, which was given in favour of the respondent on a demurrer to an information filed by the appellant, Her Majesty's Attorney-General for the colony of New South Wales, under the circumstances stated below.

On the 17th of March, 1868, an information was filed in the Supreme Court of New South Wales by the appellant, charging Allan Macpherson, the respondent, as follows: For that on the 26th of February, 1868, at Sydney, in the said colony, while the Legislative Assembly of the said colony was sitting, Benjamin Lee, a member of the assembly, whose conduct had been, and then was, under its consideration, after being heard in his place in the said assembly in reference to such conduct, was, in accordance with the practice of the said assembly, requested by the Speaker thereof to withdraw therefrom. And that the said Benjamin Lee, in obedience to the said request, thereupon withdrew from the said assembly into an ante-chamber adjoining thereto, and that immediately upon his so withdrawing into the said ante-chamber, the said Allan Macpherson, a member of the said assembly, in and upon the said Benjamin Lee did make an assault, and him, the said Benjamin Lee, did then beat,

(a) Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.



wound, and ill-treat, in contempt of the said assembly, in violation of its dignity, and to the great obstruction of its business.

A bench warrant was consequently issued by the Chief Justice of the Supreme Court, and the respondent was held to bail to appear and plead to the information at the then next sittings of the said Supreme Court in its criminal jurisdiction on the 11th of May then next.

On the said 11th of May the respondent appeared before the court at Darlinghurst, and, being called upon to plead to the said information, filed a demurrer thereto, and a joinder in demurrer was filed by the appellant.

The demurrer came on for argument, and was argued before the court at Darlinghurst, on the 13th of May, 1868, before Cheeke, J., and Faucett, J., two of the judges of the Supreme Court; and on the 18th of the same month the judges delivered their judgment, Cheeke, J., deciding in favour of the respondent that the demurrer was good, and Faucett, J., deciding in favour of the Crown that the information was good, and the demurrer ought to be overruled. After some discussion, on application of the respondent that the judgment of the court should be held to be in his favour, the respondent was informed by Cheeke, J., that he must plead, and subsequently Cheeke, J., ordered a plea of not guilty to be entered for the respondent, and the trial to proceed. The hearing of the case was, however, then postponed until the following day.

On the following day it was thought proper that the demurrer should be argued before the Supreme Court sitting in *banco*, and accordingly on the 5th of June, 1868, the demurrer came on to be heard before Sir Alfred Stephen, C.J., Hargrave and Cheeke, JJ., the respondent appearing in person in support of the demurrer, and the appellant in support of the information.

On the 8th of June, 1868, the Court gave judgment for the respondent, Sir Alfred Stephen, C.J., holding that the appellant was entitled to judgment; but Hargrave and Cheeke, JJ., holding that the respondent was entitled to judgment.

Sir *R. Palmer*, Q.C., and *Cohen* for the appellant, contended that the information sufficiently charged a common assault; that the words imputing contempt of the Legislative Assembly, violation of its dignity, and obstruction of its business, might, if necessary, be rejected as surplusage; that if the information did not sufficiently and properly charge a common assault, then, that the facts charged therein amounted to an obstruction and a contemptuous interruption of the business of the said Legislative Assembly, and were a misdemeanor punishable by the common law. They referred to "*Taylor on Evidence*," s. 215; *Rex v. Hunt* (2 Camp. 583); *Earl of Thanet's case* (27 St. Tr. 827).

The respondent did not appear.

Judgment was delivered by Lord CAIRNS.—In this case their Lordships are of opinion that the appeal ought to be allowed,

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that the judgment which has been entered in the colony for the defendant should be reversed, and that the demurrer of the defendant should be overruled, and their Lordships will humbly report to Her Majesty to this effect. Beyond that their Lordships do not proceed. They leave it to the Attorney-General to take such steps as he may think fit, if he should desire to take further steps with reference to the judgment in the colony. Their Lordships read the information in this case as an information which states in fit and apt terms that an assault was committed by the defendant upon the person named in the information, viz., Benjamin Lee; they read it as alleging that “the defendant in and upon the said Benjamin Lee did make an assault, and him, the said Benjamin Lee, did then beat, wound, and ill-treat;” words which, in all respects, are apt words for the purpose of describing a common assault. They find, then, that added to those words there are some further words, viz., “in contempt of the said assembly, in violation of its dignity, and to the great obstruction of its business.” Their Lordships cannot read these words as an allegation of a further or of a separate offence, but simply as the statement of a consequence resulting from that common assault which is described in the earlier words. Whether that consequence did or did not result from the common assault, whether that consequence ought or ought not to be considered as an aggravation of the common assault, is to the mind of their Lordships immaterial. The words do not alter the character, or the allegations with regard to the character, of the offence which is charged. They may be surplusage; but if surplusage, they do not in any way injure or take away from the effect of the earlier averments. Their Lordships are perfectly satisfied with the reasons upon this head which have been given by the Chief Justice in the colony. They desire to express their concurrence with those reasons; and it is upon those grounds their Lordships have arrived at the conclusion which has been already intimated.

*Judgment reversed.*

Solicitors for the appellant, *Oliverson, Peachey, Denby, and Peachey.*

## OXFORD CIRCUIT.

WORCESTER SUMMER ASSIZES, 1870.

(Before MELLOR, J.)

REG. v. DEELEY AND OTHERS.(a)

*Practice—Evidence of persons jointly indicted.*

*Three prisoners were jointly indicted for felony. They pleaded not guilty, and were tried together. Two of the prisoners were allowed to be called as witnesses on behalf of the third. They were all three convicted.*

**P**RISONERS were jointly indicted for robbery with violence.

Before the prisoners were given in charge to the jury, *Jelf*, for the prisoner Deeley, informed his Lordship that he proposed to call the female prisoners as witnesses for Deeley, and that if this course were not permitted, he must ask that the prisoners should be separately tried; but, he argued, the women might be properly called for the defence of Deeley, although all three prisoners were tried together. The Evidence Act, 14 & 15 Vict. c. 99, s. 3, only prevented the parties to criminal proceedings giving evidence for or against "themselves." In proceedings before justices, the evidence of one defendant was frequently taken for or against another jointly charged. In the case of *Winsor v. The Queen* (10 Cox Crim. Cas. 276; 14 L. T. Rep. N. S. 567), the evidence of one prisoner was received against another included in a joint indictment, although the testifying prisoner had pleaded not guilty, and had not withdrawn her plea, neither had a verdict been given either for or against her, nor had a *nolle prosequi* been entered. The principle was not affected by the fact that the prisoners were being tried together.

*Selfe*, for the prosecution, contended that prisoners upon their trial together could not be called as witnesses for or against each other. In *Winsor v. The Queen* the prisoner Winsor was alone upon her trial when her fellow prisoner gave evidence for the Crown.

MELLOR, J.—The female prisoners might be called on behalf of the prisoner Deeley, although the trial had proceeded against all.

The three prisoners were then given in charge to the jury

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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together, and at the close of the case for the prosecution the two women were called for Deeley, and were examined and cross-examined; but

*All three prisoners were convicted.*

Attorney for the prosecution, *Wainwright*, Dudley.  
Attorney for the prisoner, *Clutterbuck*, Worcester.

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## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1870.

(Before PIGOTT, B.)

REG. v. MONAGHAN AND GRANGER. (a)

*Misdemeanor—Endangering safety of passengers on railway—  
24 & 25 Vict. c. 100, s. 34.*

*Sect. 34 of 24 & 25 Vict. c. 100, enacts that whosoever by any unlawful act, or by any wilful omission or neglect, shall endanger, or cause to be endangered, the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor.*

*Two boys went upon premises of a railway company and began playing with a heavy cart, which was near the line. Having started the cart, it ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to him "Let it go." The cart ran on without pushing until it passed through a hedge, and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it:*

*Held, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge, and so on to the railway, the boys might be properly convicted under the above statute.*

## I NDICTMENT for misdemeanor.

First count, charged that James Monaghan and Samuel Granger . . . unlawfully did throw a certain thing, to wit, a cart, upon a certain railway, . . . and thereby did then endanger the safety

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

of certain persons then conveyed and being in and upon the said railway.

Second count (the same, but with the words "a piece of wood," substituted for "a cart").

Third count charged that they did, by throwing a certain thing, to wit, a cart, upon a certain railway, . . . obstruct a certain engine and certain carriages using the said railway, against, &c.

It appeared from the evidence that the prisoners, who were boys, went upon the premises of the London and North-Western Railway, near the line, and began playing with a heavy cart there, by running it up and down an embankment. Being started by the prisoners, the cart ran by its own impetus and without being further pushed, until it passed through a hedge, through a fence of posts and rails and over a ditch, and then ran on to the line of the railway. Before the cart reached the hedge, Monaghan endeavoured to twist the shafts so as to overthrow and stop it; but Granger called to him to "let it go." They left the cart in such a position that it was not quite clear of the line of rails.

At the close of the evidence for the prosecution,

*Young* submitted that there was no case against the prisoners.

PIGOTT, B.—The 24 & 25 Vict. c. 100, s. 34, enacts that whosoever by any unlawful act or by any wilful omission or neglect shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor. Now was there not here an unlawful act which endangered the safety of passengers? Suppose a train had come along and struck this cart, will it not be for the jury to say whether the act endangered the safety of passengers by the train?

*Young*.—Turning the cart round was not an unlawful act.

PIGOTT, B.—Yes; interfering with it was a trespass.

*Young* having addressed the jury, and the learned Judge having summed up,

The jury found the prisoners guilty, but recommended them to mercy on the ground that they did not contemplate the consequences of their act.

PIGOTT, B.—You are of opinion that they did not think the cart would go through the hedge?

The Jury.—Yes.

PIGOTT, B.—Is not that equivalent to a verdict of not guilty?

*Motteram*.—But the moving of the cart by the prisoners was an unlawful act.

PIGOTT, B.—An unlawful act *quâ* the railway? I think it was. (To the jury): Do you think that the natural consequence of starting the cart in the first place was that it ran through the hedge?

The Jury.—Yes.

The learned JUDGE then sentenced the prisoners to two calendar months' imprisonment.

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Railway—  
Endangering  
passengers.

## BIRMINGHAM BOROUGH SESSIONS.

October 26, 1870.

(Before A. B. ADAMS, Q.C., Recorder.)

REG. v. GEORGE BOLUS.

*The Debtors' Act (32 & 33 Vict. c. 62), s. 11—Prosecution under—Disposal of goods before bankruptcy—Intent to defraud—Failure by bankrupt to disclose transactions to trustee.*

*By sect. 11 (sub-sect. 1) of 32 & 33 Vict. c. 62, if any bankrupt or person whose affairs are liquidated by arrangement does not (inter alia) fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, and how and when and for what considerations he disposed of any part thereof not in the way of his trade, or in the ordinary expense of his family; or (sub-sect. 15) if within four months next before the presentation of a bankruptcy petition against him, or the commencement of a liquidation, he, being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit, and has not paid for, he shall be guilty of a misdemeanor, unless the jury is satisfied that he had no intent to defraud.*

*On the 15th of May the prisoner, who was a tool maker, gave an order for six tons of steel. On arrival at his wharf he did not allow it to be unloaded, and on the 13th of June sold it at 14s. per cwt. for cash. Its estimated value was 18s. per cwt.*

*On the 28th of June a petition in bankruptcy was filed against the prisoner. He was adjudicated bankrupt on the 29th; on the 4th of July a receiver was appointed, who was subsequently made trustee, but the bankrupt did not discover the above-mentioned transaction until it was forced out of him on the 26th of July before the registrar:*

*Held, that there was a case to go to the jury.*

*Seemle, it lies upon the prisoner to negative the intent to defraud.*

*Reg. v. Thomas (ante, p. 535; 22 L. T. Rep. N. S. 138), referred to.*

**T**HE prisoner was indicted under sub-sects. 1 and 15 of sect. 11 of 32 & 33 Vict. c. 62, for not fully disclosing all his transactions to the trustee under his bankruptcy, and for



disposing of goods, obtained upon credit within four months of his bankruptcy and not paid for, otherwise than in the ordinary way of his trade.

Hon. *E. C. Leigh* and *Rosher* appeared for the prosecution.

*Motteram* and *Buzzard* defended the prisoner.

The prisoner was an edged-tool maker, of Wharf-street, Aston. On the 15th of May the prisoner gave an order to the traveller of Messrs. Peace and Co., of Sheffield, for six tons of steel. The steel was consigned to the prisoner, *per* Midland Railway Company, but on its arrival at his wharf at Aston, the prisoner did not allow it to be unloaded, on the ground of excess, and said he would write to the company about it. It therefore remained in the company's waggon. On the 13th of June the prisoner sold the steel to Mr. Ansell, tool broker, Gosta-green, for 14s. per cwt., and gave him a written order to obtain it. Ansell paid the prisoner in ready notes and gold, the prisoner stating that he expected to open business again, and if so he would purchase the steel back again, giving Ansell a profit. The price that Messrs. Peace put upon the steel was 18s. per cwt.

On the 28th of June, Mr. Howes, a creditor, filed a petition in bankruptcy against the prisoner in the Birmingham County Court. The adjudication was made on the 29th of June; on the 4th of July, Mr. Alfred Harrison, accountant, was appointed interim receiver, and subsequently trustee, by a meeting of creditors held on the 15th of July. The bankrupt surrendered on the 26th of July, and was examined before the registrar. The prisoner made no statement to the trustee concerning the transaction, and the trustee knew nothing about it until this date, when it was elicited in cross-examination. The file of the proceedings in bankruptcy showed that the prisoner said, on the 26th of July: "I have sold steel to Mr. Ansell five or six weeks ago, which was not entered. I sent the load back to the railway because it was more than I ordered. I did not fetch it back from the railway, but sold it to Mr. Ansell for about 100l., and spent the money in law and going to London. If I had used the steel in the way of my trade, I should have used it for edge-tools." Mr. Harrison, the trustee, was called, and he stated that the only statement of affairs he could obtain from the bankrupt was a draft list of his creditors. He went through the prisoner's books, but could find no entry or any invoice relating to the purchase or sale of the steel.

*Motteram* submitted that there was no evidence to support the prosecution. The disposal of the goods must be with intent to defraud, and the prosecution had not proved that intent.

*Leigh* said it was not for the prosecution to show intent to defraud, but it was for the other side to show that there was no such intent. The words of the section were, "unless the jury is satisfied that he had no intent to defraud." He contended that those words shifted the onus of proof on to the other side.

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The RECORDER referred to *Reg. v. Thomas* (*ante*, p. 535; 22 L. T. Rep. N. S. 138), and said that Lush, J., seemed to be of opinion that it was for the prisoner to prove that he had no intent to defraud. He should hold that there was a case to go to the jury.

*Leigh* summed up the case for the prosecution.

*Motteram* urged that there was no intent to defraud. As to the disclosure of the bankrupt's affairs Mr. Harrison knew of the transaction within fifteen days of his appointment as trustee, and he did not know that the Act of Parliament said anything about the time, provided that the disclosure was made before the estate was administered.

The RECORDER, in summing up, explained the purpose of the Act of Parliament under which the prosecution was brought. When a man sold goods he expected his customer to pay, but the Legislature stepped in and said circumstances might occur after a contract which rendered it impossible for a debtor to fulfil his part, and it was better that the creditors should be satisfied with receiving a proportion of the sum owing to them, than that the terrors of the law should be perpetually held over the debtor. Under such circumstances it was provided that the person seeking to be discharged of his debts should make a full and free disclosure of his transactions for a considerable time immediately preceding his bankruptcy. It had been enacted that if a person, within four months preceding his bankruptcy, should dispose of property obtained on credit otherwise than in the ordinary way of trade, he should be deemed guilty of a misdemeanor, unless the jury should be satisfied that he had no intent to defraud. Practically, the jury would have to consider whether there was in the evidence of the transaction a *prima facie* case of fraud. The jury might say that, since the prisoner did not give the information to his creditors required by the law, they were confident that he must have intended to defraud his creditors. The jury would have to consider, not so much what was the prisoner's intention when he bought the steel as when he sold it to Mr. Ansell.

The jury retired for a few minutes, and returned into court with a verdict of guilty.

The RECORDER, in passing sentence, said he desired to express his approval of the prosecution having been instituted, for he considered that a man who sought advantage of the Bankruptcy Act, and, as it were, to pay his creditors by means of a certificate, ought at least to give up all he possessed and afford all possible information as to his transactions to his creditors, or the assignees who might be appointed. The prisoner had taken a different course, and had concealed from them a transaction not necessarily fraudulent of itself, but which, when it came to be concealed and all trace of it obliterated from his books, the jury had decided to have been done to defraud. It was the first case of the kind under the new Act tried in the Birmingham district, and in order that it might not appear that undue severity was used when

a new law came into force, he should not pass so heavy a sentence as he would otherwise have done. The sentence of the court was that prisoner should be imprisoned as a first-class misdemeanant for two calendar months.

*Two calendar months' imprisonment.*

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## PRIVY COUNCIL.

*July 25 and 26, 1870.*

(Present: The Right Hon. Lord CAIRNS, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER).

LEVINGER, app., v. THE QUEEN, resp. (a)

*Criminal law—Practice—Jury de medietate linguæ—Peremptory challenge to alien juror—6 Geo. 4, c. 50, s. 47.*

*The appellant, on his trial for murder at Melbourne, claimed the right of peremptory challenge to an alien summoned on a jury de medietate. Under the colonial statute (The Juries Act, 1865, No. 272), like the stat. 6 Geo. 4, c. 50, s. 47, no alien juror on a jury de medietate "shall be liable to be challenged for want of freehold, or of any other qualification required by this Act, but may be challenged for any other cause in like manner as if he were qualified by this Act." The challenge was disallowed, the trial proceeded, and the appellant was convicted.*

*Held (reversing the judgment of the Supreme Court of Victoria, criminal jurisdiction) that the challenge ought to have been allowed; and that the verdict and conviction must be quashed and a venire de novo awarded.*

*The composition of a jury de medietate is prescribed by statute, but the incidents of the trial, and among them the right of peremptory challenge, are annexed by the common law, and are therefore implied and included in the statute.*

*If it be doubtful whether the right of peremptory challenge has been taken away, the prisoner should have the benefit of the doubt on the general principle "tutius erratur in mitiori sensu."*

**T**HIS was an appeal from a judgment or order of the Supreme Court of the Colony of Victoria (criminal jurisdiction) affirming a conviction for manslaughter which had been given in an information on the trial of the appellant. On the 15th of

(a) Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

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June, 1869, an information, in the nature of an indictment for murder on the high seas, was exhibited against the appellant in the Supreme Court at Melbourne.

Upon the trial of the information the appellant prayed for a mixed jury *de medietate lingue*, on the ground that he was an alien, born at Pappenheim, in the kingdom of Bavaria, and was under the allegiance of the King of Bavaria; and a mixed jury, whereof half were British subjects and the other half were aliens, was impanelled to try the appellant. Thereupon the appellant challenged peremptorily Samuel Perkins Lord, an alien, and one of the said jury, to which challenge Her Majesty's Attorney-General for the colony, on behalf of the Crown, demurred, and the appellant having joined in demurrer, the Supreme Court gave judgment (on the authority of *Reg v. Ah Toon*, 3 Wyatt, Webb, and A'Beckett, Victorian Rep. 31) against the appellant on the demurrer, and adjudged that the challenge was insufficient in law, and that Samuel Perkins Lord was not liable to be challenged peremptorily as aforesaid. The trial then proceeded, and the jury found the appellant guilty of manslaughter.

At the trial a point of law other than that arising on the said demurrer was reserved for the consideration and determination of the judges of the Supreme Court, who afterwards affirmed the conviction, and the appellant was sentenced to seven years' imprisonment with hard labour.

The following are the corresponding provisions of colonial and English statutes referred to on this question :

*Victorian Statute (1865, No. 272).*

Sect. 36.—In all inquests to be taken before any court wherein the Queen is a party, howsoever it be, notwithstanding it be alleged by them that sue for the Queen that the jurors of those inquests or some of them be not indifferent for the Queen, yet such inquests shall not remain untaken for that cause; but if they that sue for the Queen will challenge any of those jurors, they shall assign for their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisitions as it shall be found if the challenges be true or not, after the discretion of the court.

Sect. 37.— . . . Every person arraigned for any treason felony or misdemeanor shall be admitted to challenge peremptorily to the number of twenty, and every peremptory challenge above the number aforesaid respectively shall be void, and the trial or inquiry shall proceed as if no such challenge had been made . . . and unless the jurors or assessors shall be sworn for the particular trial or inquiry, every challenge shall be made as the juror or assessor comes to take his seat, and before he takes it.

Sect. 38.—On the prayer of any alien informed against for any felony, the sheriff shall, by command of the court, return for

one-half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had; and if not, then so many aliens as shall be found in the same town or place, if any, and no such alien juror shall be liable to be challenged for want of freehold or of any other qualification required by this Act, but every such alien may be challenged for any other cause in like manner as if he were qualified by this Act.

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6 Geo. 4, c. 60.

Sect. 29.—That in all inquests to be taken before any of the courts hereinbefore mentioned, wherein the king is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king, that the juries for those inquests or some of them be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but, if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisitions, as it shall be found if the challenges be true or not, after the discretion of the court, and that no person arraigned for murder or felony shall be admitted to any peremptory challenge above the number of twenty.

7 & 8 Geo. 4, c. 28.

Sect. 3.—That if any person indicted for any treason felony or piracy shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

6 Geo. 4, c. 50.

Sect. 47.—Provided that nothing herein contained shall extend, or be construed to extend, to deprive any alien indicted or impeached of any felony or misdemeanor, of the right of being tried by a jury *de medietate linguae*; but that on the prayer of every alien so indicted or impeached the sheriff or other proper minister shall, by command of the court, return for one-half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and that no such alien juror shall be liable to be challenged for want of freehold or of any other qualification required by this Act, but that every such alien may be challenged for any other cause in like manner as if he were qualified by this Act.

*Sleigh*, Serjt., and *Bell* (*Thomas* with them), for the appellant.—The colonial and home statutes, though differently worded, are substantially the same with respect to the challenge of jurors.

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The right of challenge is a common law right which applies as well to juries *de medietate lingue* as to other juries, and such right given by stat. 28 Edw. 3, c. 13, cannot be taken away, except by an express statutory provision: (Hawkins's Pl. Cor., vol. i. p. 72.) None such is contained in the statutes above set out. In *Reg. v. Giorgetti* (4 F. & F. 546), the prisoner exercised without question the right of peremptory challenge of a portion of a jury *de medietate*. Here the court below, in deciding against the appellant relied on the authority of *Reg. v. Ah Toon* (3 Wyatt, Webb, and A'Beckett, Victorian Rep. 31). In that case the prisoner, a Chinaman, on his trial for rape, obtained an order for a jury *de medietate*, and the sheriff returned a panel of eighteen foreigners. When the case was called on, counsel for the prisoner insisted that he was entitled to challenge all foreigners to the number of twenty. The judge who tried the case held that, as to the foreigners, the prisoner was entitled to challenge only for favour or special cause. The jury was balloted for on that basis, the Crown ordering one foreigner to stand aside. The prisoner was convicted and sentenced to death. Stawell, C.J., on a case stated for the full court, in affirming the conviction, said: "The right to a jury *de medietate* is the creature of statute, and the enactments of the Imperial Parliament having been repealed, so far as they are applicable to this country, the law on this subject is now contained in the Juries Statute, 1865, No. 272. The general powers of sect. 37 do not extend to this case, for the terms of that section do not fit the circumstances. The whole right of challenge as to these jurymen is found in sect. 38. There is no right of peremptory challenge given in that section, only a right to challenge for any other cause besides want of freehold qualification, and for such, but only for such, cause, in like manner as if he were qualified by this Act. We think that there is only a right to challenge for cause aliens summoned to form a jury *de medietate lingue*." Now that case was decided on a wrong construction of sect. 38. The purpose of that section was to remove the disqualification of an alien juror for want of freehold or any other qualification required by the Act, but such alien may still be challenged "for any other cause," i.e., for any other cause that would render a juror, not an alien, liable to challenge. This cause does not in any way touch the common law right of peremptory challenge. The prisoner's privilege of peremptory challenge is a large one, and is quite independent of motive. Thus in 3 Bl. Com. 353, it is said "in criminal cases, or at least in capital ones, there is, *in favorem vite*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." We therefore contend that Lord was illegally permitted to act as a juror on the appellant's trial, and that the verdict was not that of a jury duly constituted according to law.



*Archibald*, with whom were the *Attorney-General* (Sir R. P. Collier, Q.C.) and the *Solicitor-General* (Sir J. D. Coleridge, Q.C.), for the Crown.—At common law there was no right of peremptory challenge to alien jurors on a jury *de medietate*. The statute 28 Edw. 3, c. 13, in directing juries *de medietate*, provides as to the causes which may exclude aliens from such juries, in saying aliens “which be not parties, nor with the parties in contracts, pleas, or other quarrels, whereof such inquests ought to be taken;” and in giving the right “if so many aliens be in the town or place” of trial, contemplated the presence of a limited number of aliens. Again, the above statute required as to denizen jurors, that they be “good men, and not suspicious to the one party or the other,” thus naming as to such jurors the very motive for the exercise of peremptory challenge. But as to aliens there is no such provision, and therefore, by implication, peremptory challenge was not intended as to them. This right of challenge must be limited within reasonable bounds, and there is no hardship in limiting the right of challenge to aliens on a jury *de medietate*, such juries being on a peculiar footing, and restriction of the right of peremptory challenge being necessary in practice. If the prisoner have the right claimed, the Crown must have it also; for the Crown’s right of peremptory challenge is good, till the panel has been gone through and exhausted. Reference was made to *Rex v. Stone* (6 T. R. 531), *Rex v. O’Coigley and others* (26 St. Tr. 1191), *Mansell v. The Queen* (8 E. & B. 70), Co. Litt. 156 b., 158 b.; Bac. Abr. title “Juries,” E. 10, 11.

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A reply was not called for.

Judgment was delivered by Sir JOSEPH NAPIER.—In this case the appellant was arraigned at Melbourne, in the Supreme Court of the colony of Victoria, upon an information for murder, to which he pleaded not guilty, and put himself upon the country. He then suggested and set forth that he was an alien, and prayed the Queen’s writ for having a jury *de medietate* summoned for his trial on the information. This was granted, and a jury was returned and impanelled accordingly. The single question raised on this appeal is whether the appellant was entitled to challenge peremptorily one of the jurors who was an alien. The Supreme Court disallowed the challenge; the trial proceeded, and the appellant was convicted. The rule of the common law, as it has been modified by the 37th section of the Victorian statute, provides that every person arraigned for any treason felony or misdemeanor, shall be admitted to challenge peremptorily to the number of twenty jurors: (Juries Statute, 1865, No. 272.) The right of peremptory challenge at common law was a principal incident of the trial of felony. When Sir E. Coke comments upon the 33 Hen. 8, c. 23, which for a time took away the right of peremptory challenge in cases of high treason, he says, “the end of challenge is to have an indifferent trial, and which is required by law, and to bar the party indicted of his lawful challenge is to

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bar him of a principal matter concerning his trial :” (3 Inst. 27.) In *Munsell v. The Queen* (8 Ell. & B. 71), Lord Campbell, C.J., observes that “unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily administered ; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness.” The Victorian statute provides in sect. 36, “that in all inquests to be taken before any court wherein the Queen is a party, howsoever it be, notwithstanding it be alleged by them that sue for the Queen that the jurors of those inquests, or some of them, be not indifferent for the Queen, yet such inquests shall not remain untaken for that cause ; but if they that sue for the Queen will challenge any of those jurors, they shall assign for their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisitions as it shall be found if the challenges be true or not, after the discretion of the court.” The right of the Crown, thus restricted, may be considered as in effect equivalent to a peremptory challenge, if, without having to resort to such of the jurors as have been “set by” for the time on the part of the Crown, there can be procured, from those returned on the panel, enough of persons not objected to to make a jury. The restriction in practice imposed on the Crown is that it shall not exercise its prerogative so as to make it necessary to put off the trial for want of a jury such as the party arraigned is entitled to have upon his trial. The right of this party to challenge peremptorily (but restricted to the number of twenty) is preserved under the 37th section in all cases of arraignment for any treason or felony, and it has been extended by this section to cases of misdemeanor. It has been contended on the part of the Crown that this right of peremptory challenge, thus secured, was taken away in part by the appellant’s having obtained the benefit of the 38th section, by which he was enabled, when arraigned for the felony, to claim a trial by a jury *de medietate*. The early statute which conferred this privilege on aliens in cases at the suit of the king was the 28 Edw. 3, c. 13, s. 2, enacted “for the benefit and in favour of aliens.” The words of the enactment are in the affirmative, professing to confer a privilege, not to take away a right confessedly material to secure an indifferent trial, which is required by law. Under the 37th section of the Victorian statute the right of peremptory challenge on the part of the prisoner on his arraignment is certain ; but it is not equally certain that this right was taken away in part by the necessary operation of the 38th section ; or that the rule of the common law as to peremptory challenge was interfered with in any such case by the necessary operation of 28 Edw. 3, c. 13. In a case where the question arose as to the taking away by implication the right of peremptory challenge in felony, *Grey v. The Queen* (11 Cl. & Fin. 480), Tindall, C.J., said,

"If the question be whether his right to the peremptory challenge has or has not been taken away, it appears to me that in accordance with the general principle of decision applied to criminal cases, *Tutius erratur in mitiori sensu*, the decision of such question is to be given in favour of the prisoner, who is not to be deprived by implication of a right of so much importance to him given by the common law, and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute." An example of the like construction is to be found in Hawk. P. C. bk. 1, ch. 7, s. 9 (felony and misprision of felony), where it is said, "If a statute create a felony, and says that the offender shall suffer death, yet he shall in such case have the benefit of clergy, for this, being a privilege allowed by the common law, cannot be taken away without express words." The composition of a jury *de medietate* is prescribed by the statute, but the incidents of the trial are annexed by the common law, and are therefore implied and included in the statute. If on a *venue* of half denizens and half aliens, the sheriff returns twelve as aliens, and among them some who in truth are not such, the party may challenge the array for want of a sufficient number of aliens: (Hawk. P. C. bk. 2, ch. 42, s. 43.) There is no express provision in the statute for this, but it is not excluded, and that is enough. The right and the privilege are consistent and stand well together. Not only is there no inconsistency in retaining the right of peremptory challenge in a case like the present, and claiming the privilege of having a trial by a jury *de medietate*, but there are sufficient reasons for making use of both. In addition to what has been observed by Lord Campbell, C.J., as to peremptory challenge, and which applies to all jurors impanelled on a trial for felony, there may be aliens with national prejudices and hostile feelings against the prisoner; and objections which he could not make out by legal evidence. There is not a reason assigned in books of authority in favour of the right of peremptory challenge that is not at least as applicable (if not in some instances more so), to an alien as to any of the other jurors. It is to be observed that by the 38th section an alien juror, impanelled on a jury *de medietate* is not liable to be challenged for want of freehold or of any other qualification required by the Act. This is in accordance with the principle of the earlier statutes (9 Hen. 6, c. 29, and others), by which the laws relating to aliens as to holding property, were not allowed to interfere with the privilege of having a trial by a jury *de medietate*. The 34th section of the Victorian statute makes the want of qualification according to the Act a ground of challenge, and, therefore, it was necessary to remove this hindrance to an alien juror serving on such a jury, under the 38th section. This section places him in the same position as if he had the qualification required by the Act, but leaves him subject to be challenged for any other cause of challenge; that is to say, for any personal disqualification at common

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law, except alienage itself. The statute being in the affirmative, leaves the common law as to these unaffected. This is in accordance with the view of Willes, J., in delivering the opinion of the judges in *Mulrany v. The Queen* (L. Rep. 3 H. of L. Cas. 315). But for the express saving in favour of the alien juror, the disqualifications as to property would have attached, as in the case of a denizen juror. In every instance where the Legislature has not interfered in his favour, it will be found that an alien juror is dealt with as if he were a denizen. The closing words of the 38th section are obviously introduced *ex abundanti cautela*, and the words immediately preceding refer to challenges for cause, as distinguished from those that are peremptory. It was not necessary to draw any distinction between the alien and the denizen moiety of the jury with reference to the law of peremptory challenge, the reason for which applied to both; but it was necessary to distinguish with reference to challenges for cause, and to make special provision as to these for the case of alien jurors on a jury *de medietate*. The words of the section relate to challenges for cause only, and are in the affirmative; so that the right of peremptory challenge is not in any way prejudiced. Whenever the case requires it, and the reason of the rule applies, the law of juries, in the absence of a positive provision to the contrary, is applicable to jurors on a jury *de medietate*. The instance of a challenge to the array has been mentioned. There is another instance in the extension of the law as to a *tales*, where, although the words in the statute were appropriate to the common trials of English, yet the law was extended to a jury *de medietate*. The case is reported in Popham 36, and is fully set out in 10 Rep. 104-6. No case has been cited before the decision of the Supreme Court in 1866, and no text book of authority has been referred to, in which the distinction contended for between the alien and the denizen portion of the jury *de medietate*, as to the law of peremptory challenge, has been suggested. The case of *Reg. v. Giorgetti* (4 F. & F. 546) seems to have proceeded on the principle that an alien juror impanelled was subject to peremptory challenge. As to the exercise of the right of the Crown, under the special circumstances of that case, it seems to have been reasonably restricted, so as not to prejudice or abridge the right of the prisoner to have a jury *de medietate* to try him, so far at least as it was practicable to obtain such a jury. The result is, that their Lordships are of opinion that the challenge put forward by the appellant in this case ought to have been allowed. That neither in the provision for the composition of the jury *de medietate*, nor in that for relieving the alien jurors from liability to be challenged for want of a qualification under the Act, nor in that for preserving the liability for other causes of challenge existing at common law, is there to be found anything that takes away, or is inconsistent with, the right of peremptory challenge given by the common law and preserved by the statute as a principal incident of the trial of the felony, and consequent upon

arraignment. Their Lordships, therefore, will humbly advise Her Majesty that the appeal should be allowed, that the verdict and conviction should be quashed, and a *venire de novo* awarded.

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*Judgment reversed and conviction quashed.*

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Solicitors: *H. A. Graham; Solicitor to the Treasury.*

## COURT OF QUEEN'S BENCH.

*November 22, 1870.*

**ALLEN v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.**

*Duty of police where a charge of felony is made.*

*The plaintiff purchased a ticket at a station on the line of the defendants, a railway company, and a dispute having arisen as to the change given him between the plaintiff and the clerk who gave him the ticket, the clerk called the policeman on duty at the railway, and gave the plaintiff into custody on the charge of attempting to steal money from the till. The charge being afterwards heard and dismissed as without foundation:*

*Held, in an action against the railway company for illegal arrest and false imprisonment, that there was no implied authority on the part of the clerk to give any person into custody on such a charge, and, therefore that the defendants were not liable for this wrongful act of their servant.*

*The duty of the police where charges of felony are preferred commented on and explained.*

**THIS** was an action for assaulting and illegally arresting and imprisoning the plaintiff.

The defendants pleaded not guilty.

At the trial, which took place at Westminster, before Blackburn, J., and a special jury, on the 5th of December, 1869, it appeared that the plaintiff, who is a furrier, carrying on business in Regent-street, was, on Sunday, the 13th of June, 1869, returning to London from Twickenham, and applied in the usual way to the booking-clerk at the Twickenham station, for a second-class ticket to Waterloo Station, in London, and on being informed that the price was 1s. 2d., gave the booking-clerk 2s. The change given back to him consisted of a

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sixpence, a threepenny piece, and a ten centime piece of French money. The plaintiff refused to take the latter piece of money, and demanded an English penny, whereupon an altercation between him and the booking-clerk ensued, in the course of which the booking-clerk accused him of putting his hand into the till which contained the money taken for the tickets. The booking-clerk then called for the station policeman, and gave the plaintiff into custody on a charge of attempting to take money from the till, and the plaintiff was taken through the streets to the Twickenham police-station, and there locked up all night. The charge in the sheet was, "for attempting to steal money from a till at the booking-office of the Twickenham railway station." The next day the plaintiff was taken before the magistrates at Brentford, who dismissed the charge without calling for evidence on the part of the plaintiff, or hearing his advocate. For this illegal arrest and false imprisonment it was sought to make the railway company liable in the present action.

The learned Judge left it to the jury to say whether the booking-clerk acted for his own ends, or out of spite; and his Lordship directed them that in either case the defendants would clearly not be answerable. But if he acted in furtherance, as he supposed, of his employers' interest, to protect their property, in that case his Lordship reserved for the determination of the court *in banco* whether there was evidence on which the jury could find that the clerk had authority so as to make the company responsible. His Lordship also reserved the question whether the policeman on duty in the railway station had any authority to arrest the plaintiff even in a proper case. The jury found that the booking-clerk in giving the plaintiff into custody was acting in defence of the company's property, and assessed the damages at 100*l.*

A rule *nisi* was subsequently obtained by Denman, Q.C., calling on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered instead thereof, pursuant to leave reserved, on the ground that there was no evidence to go to the jury that the defendants had expressly or impliedly authorised the acts of which the plaintiff complained, or why a new trial should not be had between the parties on the ground that the verdict was against the weight of evidence on the point left to the jury.

*Seymour*, Q.C., and *Blake Steele* now showed cause against the rule.—The booking clerk was, in the absence of the station-master and superintendent, the proper person to take whatever steps were necessary for the protection of the property of the railway company. Both these officers were absent when the plaintiff was given into custody, and, therefore, the clerk was the representative of the company in the acts which he did, for somebody must be left to represent the company: (*Giles v. Taff Vale Railway Company*, 2 E. & Bl. 822.) Now, if a servant of the company does that on behalf of the company which the



company might lawfully do, and does it not for his own ends or purposes, but for the benefit of the company, and if, in addition, the servant's office is such as calls on him to put the law in motion for the protection of the property of the company, then the company is liable for his acts. In *Poulton v. The London and South-Western Railway Company* (17 L. T. Rep. N. S. 11; L. Rep. 2 Q. B. 534), cited by the other side in moving for the rule, the question which the Court considered was whether the act complained of was one which the railway company itself might lawfully do; if so, they considered that the company would have been responsible for the wrongful act of their station-master. "The only question," said Blackburn, J., "(there being no doubt that the station-master did give the plaintiff into custody, and that there was false imprisonment) is, whether there was evidence that the station-master was clothed with such authority, that the act in question was within the scope of his authority, and was such that the evidence before the jury would convince them that he was authorised on the part of the company to do the wrongful act. There can be no question about this since the decision in the case of *Goff v. The Great Northern Railway Company*, that where a railway company or any other body have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which the exigencies of their business required. Where a question presents itself as to whether or no a certain act should be done on behalf of the company, the fact that the company are absent, and that an appointed person is there to manage their affairs, is *prima facie* evidence that he is clothed with authority to do all that was right and proper; and if, in the exercise of his duty, he happens to make a mistake, and does something not within the scope of his authority, his employers are not responsible for it." His Lordship added, "Had the plaintiff been given into custody under the erroneous supposition that he had not paid his own individual fare, that would have been an act done under the statute which authorises the arrest and taking into custody of any person who does not pay his fare; and, consequently, that being an act the railway company were authorised to do, it might be said that the station-master, being their representative on the spot, had authority to take into custody persons not paying their fares; and if he made a mistake, it was a mistake in doing a thing which the railway company had given him authority to do, and then the railway company would be responsible." [BLACKBURN, J.—The charge in the present case was only of a misdemeanor, and therefore it was not a proper case for giving into custody at all. Further, the cases show that the servant may do what is necessary to protect the master's property; but it is a different matter where the step which the servant takes is not simply to protect his master's property, but to punish the offending party, in furtherance of public policy.] If an attempt to rob is made to-day, surely steps taken to punish

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the guilty party are steps taken for the protection of property which otherwise might be attacked again to-morrow. If a person found with money of the company in his possession, which he is proceeding to carry off, may be given into custody in order to protect the company's property, why may not the giving into custody for attempting to steal the company's money be also considered to have the protection of the company's property as its object? [LUSH, J.—If, in order to prevent the plaintiff from robbing the till, it was necessary to call a policeman and give the plaintiff into custody, the case would be a different one. Here, all that the plaintiff intended to do had been done, and he was not in possession of any money belonging to the company.] In *Edwards v. The London and North-Western Railway Company* (L. Rep. 5 C. P. 450), where the railway company were held not liable for the act of their foreman porter, Montague Smith, J. said, "No doubt if, in furtherance of the particular business of the company, it is necessary to arrest a person, the servants of the company have an implied authority to do it." And again, "I am by no means prepared to say that there may not be officers who, from the special circumstances of their appointment, have power to arrest offenders in the name of the company; for example, policemen appointed by the company to watch their stations; so a superior officer may have a right to exercise all the power which the company would have under the circumstances; but I have no wish to express any opinion on these points." To the same effect Brett, J.: "In the case of a person being arrested for breaking the company's bye-laws, it may well be said that that is the way in which the company carry on their business; and similarly, if an officer be appointed expressly to watch the company's property, I should think if he took an innocent person into custody on the charge of stealing, it might well be said that the company were liable;" observations which seem to be applicable to the circumstances of the present case, in which the clerk was the person expressly appointed to guard the till. Where the conduct of the plaintiff was such as justified the conductor of an omnibus, in the discharge of his duty, in removing him from the omnibus, but the conductor removed him in so careless a manner that the plaintiff fell into the road and was injured; it was held that there was evidence from which the jury might find that the act of the conductor was one for which his employer was liable: (*Seymour v. Greenwood*, 7 H. & N. 355; 30 L. J. 189, Ex.) [BLACKBURN, J.—The conductor was guilty of negligence in doing the very thing which he was employed to do.] *Limpus v. The London General Omnibus Company* (1 H. & C. 526), was also referred to. [BLACKBURN, J.—That was also a question of negligence. Here the question is not one of negligence, but whether the clerk was servant of the company at all in the matter.] The following cases were also referred to: *Roe v. The Birkenhead and Liverpool and Cheshire Railway Company* (21 L. J. 9, Ex.); *Goff v. The Great Northern Railway*

*Company* (3 El. & El. 672); and *Lumsden v. The London and South-Western Railway Company* (16 L. T. Rep. N. S. 609).

*Denman*, Q.C., *Mungles*, and *Le Marchant*, in support of the rule, were not called on.

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BLACKBURN, J.—In this case there can be no doubt at all that the plaintiff was very ill used, and was most improperly arrested: but unfortunately for him he has sued the wrong party, and the rule must therefore be made absolute to enter a nonsuit. The general law of the country—putting aside statutory enactments—authorises any private person to give another person into custody for having committed a felony, provided a felony has been actually committed, and he has reasonable ground for believing that the person he has given into custody committed the felony. The reason he has that power is obviously this, that when there has been a felony committed, there is reasonable ground for belief that a particular person committed it; in many cases the accused person would escape unless a private person were authorised to seize and take him into custody, when he has reasonable ground for suspecting him; and it is often forgotten that that is the only reason why the power to arrest is given. The power to arrest ought not to be exercised except where there is reason to believe that the man given into custody would not be forthcoming to answer the charge, and then the person who gives him into custody may justify himself as having acted for the public benefit, provided two things have happened—the first that a felony was committed, and the second that he has reasonable ground to believe it had been committed by the person charged. That power is quite independent of whether the private person exercising it be the one injured or not, that is, the person whose property is stolen. When a constable is the person who has taken another into custody without a warrant, the law is more favourable to him. It is his duty to act for the public benefit, and therefore the law gives him protection if he has reasonable ground to believe that a felony has been committed, and that the person he took into custody has committed it. As I have said before in the course of the argument, I think a constable, in exercising the power that is given to him, should always take into consideration whether the circumstances are such that there is ground for thinking, if he did not exercise the summary power, the man would run away. I mention this, though it is in no way essential to the present argument, because in the present case there is extreme misconduct on the part of the police, springing from misapprehension. The police seem to have thought—and I am sorry to say I have seen many cases of the kind where policemen think the same thing—that if a person comes and says, “I charge that man with an offence,” that he, the policeman, has no discretion. That is not so. The police have power to arrest provided they have reasonable ground to believe there has been a felony committed, and that the man given into

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custody is the felon, and I do not deny that, as a general rule, where a respectable person tells him so, the policeman should believe it; but they should exercise a discretion, and see whether it is so or not; and I cannot help saying (what I did not say at the trial, because if I had said it it would have been inviting the plaintiff to bring an action; but now that the police are protected by lapse of time I will say) that if an action had been brought against the superintendent of police at Richmond for locking the plaintiff up for the night, the superintendent would have had no defence to the action, and must have paid damages. For, not only was there no reasonable ground for suspecting the plaintiff of having committed a felony, but the least inquiry would have shown there was not; and, as to the matter upon which the superintendent had a discretion, there was not the slightest ground for supposing, that if he let the man go out, he would not have been forthcoming the next morning. I state all this, though it is beside the question, simply with a view that it may be understood how much the law has been misapprehended in this case, and that the police and others may not in future fall into the error which here has done the plaintiff a grievous injury, and for which, according to the judgment we are about to give, he cannot recover any recompense against the company. If, in the case I put, where a private person gives a man into custody, although acting, and properly acting, for the public benefit—if he gives a man in charge for a felony, and in so doing makes a mistake, he makes himself liable, and, if authorised by another person to do that act, then that other person is liable also. The question in the present case is, whether there is any evidence upon which the plaintiff can prove that the railway company have given authority to the clerk—who has been dismissed, and whom they were very angry with as soon as they heard of the transaction—whether there was any authority given by the railway company to that clerk to give into custody the plaintiff, or any other person doing an act similar to that alleged against him. If so, the railway company would be liable for the misconduct of the clerk. Now, let us see what ground there is for thinking they gave such authority. It is clear there is no evidence that the railway company, in terms, or expressly, said to the ticket distributor, “If you think anybody has stolen, or is about to steal, or has meddled with our property in the till, you give him into custody on our behalf.” No such express authority is proved. The question then is, can such authority be implied? The only facts from which you can imply such an authority are these: that the man was a ticket distributor; he received the money and put it into a till; and it may be fairly said, upon this evidence, that, having the charge and custody of that money, he has such authority as impliedly exists in the case of a person who is put by his master in charge of money and property which he would be expected to take care of. Taking that authority as given to him, and taking it that he had all the

authority that arises from that, then comes the question—how far does it extend? Now I do not mean to say there might not be power of arrest implied in the duty to protect the property, to some extent; nor am I to be understood to say positively there is; though I am inclined to think that if a man, feeling a person was trying to break into a till and rob, and, in protection of the till, were to find that he could not otherwise prevent that person getting in and stealing the property than by taking him into custody, and giving him in charge—I am far from saying, although the act was wrongful, yet where the act was done to prevent the wrongful dealing with the property in his charge, that it might not be within his authority. I do not say that it would be or would not be. Again, I think where there was reason to believe on his part that the money had been actually carried away, and that he could get it back by taking the man into custody, and there was a pursuit, and he gave him into custody with a view of recovering the property taken away, I am not prepared to say that that may not be within his authority. But the present case is neither the one nor the other of these. I think there is again a marked distinction between an act done, not for the purpose of preventing an improper, felonious, or other meddling with or injury to one's master's property, nor yet for the purpose of undoing the effect of a previous improper management or meddling, as would be the case in the pursuit, and an act done for either of these purposes. The act done in the present case was, according to the evidence, done not to prevent or undo the effect of anything, but to punish for that which had been done already. Is there any implication, or ground for implication, that, putting a man in possession of property, you authorise him to take such steps as he thinks fit for the punishment of people who he thinks have done something which has not been committed, or for the punishing of a man which has no effect at all upon the property, but is capable of justification only because it vindicates justice? Is there any authority for implying such an authorisation? If there is, it is a very important doctrine; and there is no difference, for this purpose, between a railway company, which is a corporate body, and a private individual. If this company is responsible for the act of the ticket distributor who gave the man into custody on an unfounded charge, then every shopkeeper in London would be answerable for any similar act done by a shopman whom he leaves in the shop, and who may choose to accuse another of having attempted to plunder the shop; every merchant would be responsible for his clerk; every gentleman would be responsible for his butler, who gave such an order with respect to the plate; and every gentleman would be responsible for his coachman, who gave such an order with respect to the stable. It seems to me that the principle has been properly laid down in the cases that have been cited, that there is an implied authority to do all those things that are necessary for

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the protection of the property, or for the fulfilling of the duty that one's man has been left to do. To apply the principle to this case; the clerk is to perform anything that was necessary to the business of the company, but he is not to punish for a supposed infringement of the law. Take the cases that have been cited, and you will find the distinction runs through them all. Where the company have obtained for themselves by bye-laws the power to arrest a man if he does not pay his fare, for instance, then the object is entirely to protect the fares of the company, and the primary object is to enforce the payment of the fares. There it is properly held that where they leave a man in charge of the station, he is the person to decide whether that shall be enforced. That is for the protection of the property, and he is in a position where he would have authority to consider that; but where he makes a blunder in an act that is in no way connected with the business, that authority does not apply, as was decided in the case of *Poulton v. The London and South-Western Railway Company (ubi sup.)* Then comes the later case of *Edwards v. The London and North-Western Railway Company (ubi sup.)*, which, when looked at, is the same in principle. There a man was given into custody by one who was the person who happened to be at the time left in charge of the station. The property that was alleged to be taken was timber, as I understand, which was lying near that station, which the man charged came to take away. It was not a thing to be done in the exigencies of the traffic of the company. The foreman porter who did the very act was there to protect the station, and probably had some authority, and he, under a mistaken notion that the property was improperly taken, gave the man into custody. It was held by the Court of Common Pleas that there was no implied authority to give him into custody for a theft. That goes very near to the present case. There was here no implied authority to give the plaintiff into custody for the act, supposing he had done it, of putting his hand into the till and attempting to take away a shilling. My brothers Smith and Brett in that case both state that there may be authority for that, and give instances that are applicable to the particular case, that where there was a person put there for the express purpose of watching it, you might infer from that that he had authority to give the man into custody. That might be. I do not say that it could not be; it is very possible it might; but you cannot say that the clerk in the present case, who was put to issue the tickets, was like a police constable set there to watch. Again, there is the possible case that might be put, that there is a man who is employed as a gamekeeper, and it may be very well said that there is an implied authority given to him to arrest those whom he thinks poachers, and if he makes a mistake and arrests the wrong man the master might be liable for it. The distinction is similar to that in *Edwards v. The London and North-Western Railway Company*. But in the present case there was no ground



for saying that the clerk had any such authority. Then, the policeman was not a policeman put there for that purpose. There was evidence that he had authority to enforce the bye-laws, and things of that sort, but there is no ground for saying that he had implied authority, simply because the ticket clerk said "I insist upon you taking him in charge," to obey such a very preposterous order, and consequently, there is no evidence to fix the railway company with liability on that account. On these grounds I think, then, there is a total failure of any evidence to show that the clerk was acting within the scope of his authority in giving the plaintiff into custody. I think there is no evidence to show or raise any reasonable implication that the clerk or the policeman had any authority given to him to arrest or give into custody the plaintiff for having committed an offence which was all over, and when the arrest could only be for the purpose of vindicating public justice, and not for the purpose of protecting the property of the company.

MELLOR, J.—I am entirely of the same opinion. As I understand the matter, the person here whose conduct gave rise to this action was what was called a ticket distributor; that is to say, the person who behind a counter sells tickets to those who want to travel by the railway. He seems erroneously to have thought that the person who put his hand in the till had some bad intention, but the hand had afterwards been withdrawn; the man was on the other side of the partition, and had gone away or was going away. His course of business, then, was to sell the tickets; and it was not in the ordinary course of his business that he was to give a person into custody who had made some attempt, which did not succeed, upon the till. It seems to me there is no pretence for saying that such a thing was in the ordinary course of his business. I think, therefore, the observations of the judges in *Edwards v. The London and North-Western Railway Company* are strictly applicable to the circumstances, and I agree with what is said by all the three judges in that case. My brother Keating put it thus: "There seems no ground for saying that what was done was done in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects, that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on everyone to give in charge a person whom he thinks is committing a felony, his conduct would in no way be connected with the defendants. It appears to me that that very accurately defines the condition of things here, except that it was not a felony in the present case, or a pretence for a felony. Then, my brother Smith says: "There is no evidence whatever on which a presumption of authority from the defendants to apprehend the plaintiffs can be founded, except the fact that the person who authorised his apprehension was a foreman porter, and in charge of the station at the time when the plaintiff was supposed to be stealing the defendants' property. I think an authority to apprehend the plaintiff cannot be presumed to have

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been conferred on the foreman in this case. No doubt if in furtherance of the particular business of the company it is necessary to arrest a person, the servants of the company have an implied authority to do it. Thus, if there is a bye-law of the company, and power to arrest any person infringing it, it must be presumed that the company give authority to anyone they put in charge of the station so to enforce it, since this can only be done by the company's servants on the spot." That is quite right, and accurately expresses the rule upon the subject. Then, my brother Brett, evidently referring to a similar person, although not using the precise expression, says, "In this case the company had not, I think, authorised Holmes to protect their goods by giving into custody anyone he thought right, and it was not their ordinary way of carrying on their business." That case appears to me in principle to govern this, and I am content to rest my judgment on that case, or what is enunciated by the three judges to whom I have referred. I come to the conclusion that there is no evidence of any authority whatever to act as the ticket distributor acted in this case, and therefore there is no liability on the company for his act.

LUSH. J.—I am of the same opinion. The defendants cannot be held liable for this wrongful act of the clerk, unless the act was done by their authority, express or implied. No express authority has been proved, and we cannot presume that the clerk had any other authority than what is to be implied from the duties he was called upon to perform. Now, as a ticket distributor, he had entrusted to him the tickets and the money he should receive for the tickets, and his duty to the company was to do all that was necessary to protect that property for the company. Now, if the plaintiff here had been guilty of all that was imputed to him, the property of the company would have been in no danger. What is alleged against him is, that he attempted to rob the till, not that he was attempting to do so, and that it was needful to give him into custody to prevent it: for he had ceased to make the attempt, if ever he was guilty of making it. Then there was no duty on the part of the clerk to punish him for the attempt which had altogether ceased. The property of the company not being in danger, his authority ceased, and upon that ground I think the company are entitled to judgment.

HANNEN, J.—I am entirely of the same opinion. The proposition Mr. Seymour asks us to affirm is this, that every servant who is entrusted with the property of his master has the implied authority to put the law in motion with reference to any offence that may be committed in connection with that property. I think that is a proposition wholly unsupported by authority, and one which would lead to very grievous consequences if it was established. Therefore I agree with my brothers that the rule must be made absolute to enter a nonsuit.

Attorneys for plaintiff, *Gold and Son.*

Attorney for defendants, *L. Crombie.*

*Rule absolute.*

## COURT OF EXCHEQUER.

November 14, 1870.

CANNON AND OTHERS v. RANDS.

*Alleged felony—Deficiency in a treasurer's accounts—Bond given to stay criminal proceedings—Validity of bond—Stifling a prosecution—Illegal agreement.*

*In an action on a bond in the penal sum of 1400l., the declaration charged that the bond was given by the defendant to the plaintiffs, as trustees of a friendly society, subject to a condition thereunder written, whereby, after reciting that certain moneys to the amount of 1400l. were stated to be owing from one J. S. to the plaintiffs, as such trustees, and it had been agreed that the defendant should secure to the plaintiffs the sum of 700l., part of such debt, the condition of the bond was declared to be, &c., and averred that the defendant had not paid the said 700l. or the said penalty.*

*Plea 2. That J. S. had been treasurer of the said society, and there was a deficiency in his accounts as such treasurer of a sum of 1700l., and the said trustees had caused a warrant to be issued for his apprehension with a view to proceed criminally against him for an alleged felony in respect of the said money, and thereupon it was agreed between the said trustees and the defendant that, instead of proceeding criminally against the said J. S., the trustees should accept payment of 1000l. in cash, in part of such deficiency, and take the defendant's bond for 1400l. as security for payment of 700l., other part of such deficiency, and the bond in the declaration mentioned was delivered and accepted by the trustees; in pursuance of the said illegal agreement, and upon and for no other consideration.*

*Plea 3. As a defence on equitable grounds, the defendant repeated the allegations in plea 2, to the effect that J. S. had been treasurer of the said society, and that there was a deficiency of a large sum in his accounts, in respect of which the trustees alleged that he had committed a felony, and had caused a warrant to be taken out for his apprehension; and, further, that the said bond was executed and delivered by the defendant to the plaintiffs as such trustees, upon and subject to certain terms and conditions then agreed upon between the said trustees and the defendant and other persons on behalf of J. S., that is to say, upon the terms and*

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*conditions that all prosecution of J. S. by the society or by any of its members should cease. And the defendant alleged that all prosecutions of J. S. did not cease, but, on the contrary, he was prosecuted by two members of the said society, and tried and acquitted of the several charges preferred against him. Averment, that all things happened to entitle him in equity to an unconditional injunction to restrain the plaintiffs, as such trustees, from suing on the said bond. On demurrer it was*

*Held, by the Court of Exchequer, Martin, Channell, and Cleasby, BB. (dubitante Martin, B., as to plea 2), that the pleas were good, in answer to the action on the bond as showing an illegal agreement to stifle a prosecution.*

THE plaintiffs, as trustees on behalf of the London United District Society of the Ancient Order of Foresters' Friendly Society duly established, with rules duly certified in pursuance of the statutes relating to friendly societies (all conditions having been fulfilled necessary to vest the claim hereinafter mentioned in the plaintiffs), by their declaration charged that the defendant, by his bond, dated 7th of January, 1869, became bound to the plaintiffs as and being trustees as aforesaid of the said district society in the sum of 1400*l.*, to be paid by the defendant to the last-mentioned plaintiffs, or their successors, or such trustees as aforesaid, subject to a condition thereunder written, whereby, after reciting that certain moneys, to wit, to the amount of about 1700*l.*, were stated to be due and owing from John Stimson to the last-mentioned plaintiffs as trustees as aforesaid, and that it had been agreed by and between the said John Stimson and the plaintiffs as such trustees as aforesaid and the defendant, that the defendant should secure to the plaintiffs the sum of 700*l.*, as part of the above-mentioned debt, the condition of the said bond was declared to be that "if the defendant should, on or before the 7th of July then next (which day elapsed before this suit), pay to the plaintiffs, or one of them, or their successors, as such trustees as aforesaid, the sum of 700*l.*, then the said bond should be void, otherwise to be in full force and effect; and the defendant had not paid the said 700*l.*, as aforesaid, and had not paid the said penalty, and the plaintiffs, as trustees as aforesaid, claimed 1400*l.* 1*s.*

The defendant, amongst other pleas, by his second plea said that, before the making and executing of the said bond, one John Stimson had been secretary and treasurer to the London United District Society of the Ancient Order of Foresters' Friendly Society, and there was a deficiency in his accounts as such secretary and treasurer of a large sum amounting, to wit, to 1700*l.*, which appeared by the books and accounts of the said society to be due from the said John Stimson to the trustees for the time being of the said society, and the said trustees had caused a warrant to be issued for the apprehension of the said John Stimson, *with a view to proceeding criminally against him for an alleged felony* in respect of the said money appearing by the said

books and accounts to be due from the said John Stimson to the said trustees, &c., as aforesaid, and thereupon it was agreed by and between the trustees for the time being of the said society and the defendant and certain other persons on behalf of the said John Stimson that, *instead of proceeding criminally against the said John Stimson as aforesaid*, the trustees for the time being of the said society should accept in payment of a part of the said deficiency a sum of 1000*l.* in cash, and take the bond of the defendant for 1400*l.* as security for the payment of 700*l.* other part of the said deficiency, and the bond in the declaration mentioned was delivered to and accepted by the said trustees for the time being of the said society, *in pursuance of the said illegal agreement*, and upon and for no other cause or consideration whatever.

And for a third plea, by way of defence, on equitable grounds, the defendant repeated the allegations and statements in the second plea to the effect that John Stimson had been secretary and treasurer of the friendly society therein mentioned, and that there was a deficiency of a large sum in his accounts in respect of which the trustees for the time being of the said society *alleged that he had committed a felony*, and had caused a warrant to be taken out for the apprehension of the said John Stimson. And further, that the said bond was executed and delivered by the defendant to the plaintiffs as such trustees, &c., upon and subject to certain terms and conditions then agreed upon by and between the trustees for the time being of the said society, and the defendant and certain other persons on behalf of the said John Stimson, that is to say, upon the terms and conditions that all prosecution of the said John Stimson by the said society or by any of its members should cease; and the defendant alleged that the prosecution of the said John Stimson did not cease, but, on the contrary, he was *prosecuted by two members of the said society*,<sup>(a)</sup> and tried and acquitted of the several charges preferred against him. Averment that all things happened, &c., to entitle him in equity to an unconditional injunction to restrain the plaintiffs as such trustees as aforesaid from suing on the said bond.

Demurrer and joinder in demurrer to the said pleas 2 and 3. A ground of demurrer to the second plea was, that it was bad because it was consistent with the plea that all parties supposed that no crime had been committed.

A ground of demurrer to the third plea was that such plea was bad, because, under the circumstances therein set forth, a perpetual and unconditional injunction could not be obtained in equity by the defendant to restrain the plaintiffs from proceeding in this case.

The plaintiff's points for argument.—First, that it is not stated that any crime had been committed, and it is consistent with the allegations that all parties knew that no prosecution could be maintained; secondly, that a court of equity would not interfere

(a) The words here appearing in italics were inserted during the argument by the defendant's counsel as an amendment, at the suggestion of Martin, B.

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under the circumstances stated ; thirdly, that the third plea seeks to vary the written document otherwise than for the purpose of establishing an illegality.

The defendant's points for argument.—First, that the second plea shows that the plaintiffs were parties to a corrupt agreement to stifle a prosecution, and that the bond sued upon was given in pursuance of due consideration for the said corrupt agreement ; secondly, that the third plea is good, because it shows that the plaintiffs were parties to a corrupt and illegal agreement ; and a court of equity would restrain them from taking advantage of their own corruption and illegality ; thirdly, the third plea is also good, because it shows that the bond was given to the plaintiffs upon a condition which was broken.

*Quain*, Q.C. (with him was *Bosanquet*) for the plaintiffs, in support of the demurrer to the second and third pleas. The second plea is bad for not alleging that any felony was committed ; and the third plea is bad on the ground of being an attempt to vary a deed by putting in evidence against it a parol agreement ; and, secondly, it is an attempt to act upon an agreement which the defendant says is an illegal agreement. It is a well-known rule of evidence that a written contract cannot be varied by parol ; and the rule is the same both at law and in equity. In *Pooley v. Harradine* (7 E. & B. ; 26 L. J. 156, Q. B.), Coleridge, J., delivering the considered judgment of the Court of Queen's Bench, said : " The plaintiff having demurred to this plea, we have to determine whether the facts stated in the plea amount to an equitable defence at law. It seems to have been thought that the discharge of the surety, by such giving time to the principal, was founded on a *variation of the contract* between the creditors and the surety ; and, if that be so, it necessarily follows (*the rule of evidence as to not varying a contract by parol being the same at law and in equity*) that no parol contemporaneous agreement could be allowed to vary the contract in the case of a written instrument."

[CLEASBY, B.—You say it cannot be made part of the contract.] Clearly it cannot ; no parol evidence is admissible to control the absolute effect of a bond in the absence of fraud : (*Ex parte Morley, re Govett and Leigh*, 2 Deac. & Chit. 50). *Croome v. Lediard* (before the Master of the Rolls, 2 Myl. and K. 251, and affirmed on appeal by the Lord Chancellor, *Ib.* 257) is to the like effect in the case of a written agreement. [CLEASBY, B.—I should imagine there were numerous cases to show that if a bond be given for a particular purpose, equity would interfere to prevent its being enforced for a totally different purpose.] The technical rule, with regard to the non-admissibility of parol evidence in such a case, holds in equity as well as at law, that the contract cannot be contradicted. In the case of fraud (but there is none here), upon filing a bill, equity would order the contract to be delivered up to be cancelled ; or, on the ground of some mistake or omission, the party might be entitled in equity to have the contract reformed. But this is a perfectly good bond on the



face of it, and it is not competent either at law or in equity to import into it terms which do not appear on its face. When is the prosecution to cease? He might be prosecuted twenty years hence. Here, too, the defendant was a party to the wrong, and cannot, as a *particeps criminis*, be allowed to set up that wrong as an answer to this action. He cited also "Taylor on Evidence," 5th edit., par. 1041, p. 987.

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*Gates*, for the defendant, *contra*, supported the pleas, and contended that they were good. Parol evidence may be given either to defeat or to meet the contract sued upon. The law on that point is thus laid down by Story, J., in his "Commentaries on Equity Jurisprudence" (vol. 2, s. 1531, p. 788, 10th edit.), "The same general rule prevails in equity as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments; and that the interpretation of them must depend upon their own terms. But, in cases of accident, mistake, or fraud, courts of equity are constantly in the habit of admitting parol evidence to qualify and correct, and *even to defeat* the terms of written instruments." Equity will interfere, also, to restrain an illegality or things prohibited by the moral or statute law. It has been urged by the plaintiffs that the defendant, being a party to the wrong, has no *locus standi*, but I contend that equity would have ordered this document to be delivered up to be cancelled. It may be true that in *general* courts of equity, following the rule of law, will not interfere to grant relief where the parties are concerned in illegal transactions, upon the principle of the maxim, *In pari delicto, potior est conditio defendentis, et possidentis*; but, as Story observes (1 *Ib.* sect. 298, pp. 294-5), "In cases where the agreements or other transactions are repudiated on account of their *being against public policy*, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material." Thus, in *Osbaldiston v. Simpson and others* (13 Sim. 513), before the Vice-Chancellor of England, securities given by the plaintiff to prevent a prosecution for cheating at cards were decreed to be delivered up. The pleas are good. Looking at them as at law, they show an agreement made upon a condition, which condition has not been performed, and so cannot be sued upon; or, looking at them in an equitable point of view, then they clearly show an illegal agreement. Shutting one's eyes to the illegality, the third plea is good at law, the condition not having been performed. In *Lindley v. Lacey* (17 C. B. N. S. 578; 11 L. T. Rep. N. S. 273), upon a negotiation between the plaintiff and the defendant for the sale of the fixtures, furniture, and goodwill of a business (the agreement for which was afterwards reduced into writing), a *distinct and separate promise* was made by the defendant in consideration of the plaintiff's signing the agreement, that he, the defendant, would settle an action then pending against the plaintiff at the suit of one C.; and it was held by the Court of Common Pleas that evidence of this prior oral agreement was admissible, notwithstanding the written

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agreement contained an authorisation to the defendant to settle C.'s action out of the purchase-money. Erle, C.J., in giving his judgment in that case, in commenting on several of the cases cited in argument, said, at p. 585, of 17 C. B. N. S., "If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there. But, if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced. In some of the cases, as in *Harris v. Rickett* (4 H. & N. 1; 28 L. J. 197, Ex.), there was a prior verbal agreement. In *Davis v. Jones* (17 C. B. 625; 25 L. J. 91, C. P.) the oral and the written agreement were contemporaneous. So, in *Wallis v. Littell* (5 L. T. Rep. N. S. 48; 11 C. B. N. S. 369; 31 L. J. 100, C. P.), there was a contemporaneous oral agreement that the farm was not to be transferred unless Lord Sydney consented to accept the plaintiff as his tenant. It is clear, therefore, that, if there be a distinct collateral oral agreement between the parties, it is immaterial whether it precedes, or is contemporary with, the written agreement. I think it is clear from the evidence here that there was a distinct collateral agreement that Chase's action should be settled by the defendant, and that evidence of that agreement, which was perfectly consistent with the written agreement, was admissible; the rule, therefore, will be discharged;" and in that opinion both Byles and Keating, JJ., concurred. The case of *Bannerman v. White*, (4 L. T. Rep. N. S. 740; 10 C. B. N. S. 844; 31 L. J. 28, C. P.) is also an authority that, setting aside the question of illegality, this plea is good at law, on the ground of the non-performance of the condition. [MARTIN, B.—In that case there was no written contract at all.] The reasoning there is applicable here. The bond is vicious as founded on an illegal contract. The plea shows that, and is good. In the recent case of *Williams and another v. Bayley*, in the House of Lords (14 L. T. Rep. N. S. 802; L. Rep. 1 Eng. & Ir. App. 200; 35 L. J. 816, Ch.) the House of Lords upheld the decision of Stuart, V.C., that equitable security for the payment of certain bills, obtained by the plaintiffs from the defendant by working on his fears for the safety of his son, who had forged the defendant's signature to such bills, though without holding out any direct threat or any distinct promise not to prosecute, was void, as having been obtained by undue pressure; and they held also that the arrangement was invalid, as amounting to an agreement to stifle a prosecution. That is precisely the case here. The second plea setting out the illegal agreement, is good at law; and it is not necessary to allege in a plea of this sort, that the party had been guilty of felony. The defendant in these cases is usually the party himself, and

he would never be found alleging his own guilt on the record. To do so would be to turn a Nisi Prius court into a criminal court. Again in *Kier v. Leeman and another*, (6 Q. B. 308; 13 L. J. N. S. 250, Q. B.) it is said most distinctly by Lord Denman, delivering the considered judgment of that court (at p. 316) that "the principle of law is laid down by Wilmot, C.J., in *Collins v. Blanterne* (2 Wils. 341, 349; 1 Sm. L. C. 154; *Ib.* 4th edit. 263; *Ib.* 6th edit. 325) that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on unlawful consideration, and void. Of the soundness of this decision no doubt could be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe." That case was affirmed in error (9 Q. B. 371; 15 L. J. N. S. 360, Q. B.); and in the considered judgment of the court, delivered by Tindal, C.J., his Lordship said (p. 392): "It seems clear, from the various authorities brought before us in the argument, that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration." In no single case has it been held necessary to allege that the party was guilty of the offence. It is the illegal agreement to *stifle the prosecution* which is the main point. It was an interference with the administration of the law, whether the man was guilty of the felony or not.

*Quain*, Q.C., in reply.—The defendant ingeniously mixes up the two pleas together, and supports the one by reference to the other. But the two are distinct. If illegality were shown on the face of it, I could not support the present contention, but no illegality is shown on the face of plea 2, and plea 3 attempts to set up a parol agreement to upset a written one. If one accused a man by mistake of felony, and said, "I won't go on with the prosecution, but you must give me a bond," there would surely be no obligation to go on with the prosecution. The defendant calls this an "illegal agreement," but there is no allegation showing it to be so. All parties knew there had been no felony at all. The case of *Ward v. Lloyd* (7 Sc. N. R. 499; 6 M. & G. 785; 13 L. J. N. S. 5, C. P.) shows that to induce the court to set aside a security as given upon an agreement to compromise a felony, it must most distinctly and clearly appear that a felony has been committed. Lord Westbury, in the House of Lords, in *Williams v. Bayley* (*ubi sup.*), lays down the principle in most lucid language, that parties who are aware that a felony has been committed, are not to make a trade of it, and convert a crime into a source of profit to themselves. So I here contend that the plea should show a crime committed, knowledge of such crime by the parties, and a corrupt taking of money to prevent the course of justice; no one of which

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things is shown. As to *Kier v. Leeman*, there it was stated, on the very face of the declaration, that the crime had been committed; the main point in that case was whether there was any distinction between compromising a misdemeanor and compromising a felony, and the point for which the case has been cited on the present occasion never in fact arose. The third plea amounts to no more than the second. It contains no allegation of illegality. [CHANNELL, B.—It puts it in the form of an agreement, and, whether that agreement be legal or illegal, it was a breach of it.] The passages cited from Story are not disputed by the plaintiffs. There was no “fraud” or “mistake” here, nor has it been brought by my friend under any other head, justifying equitable relief. If *Lindley v. Lacey* be law, it can only be on the authority of the class of cases, such as *Pym v. Campbell and others*, (6 E. & B. 370; 25 L. J. 277, Q. B.); and *Davis v. Jones* (17 C. B. N. S. 625; 25 L. J. 91, C. P.).

MARTIN, B.—I believe that we are all of opinion that the defendant’s third plea is a thoroughly good plea. With regard to the second plea, speaking for myself alone, I confess I have some doubt, but I have none as to the third. (His Lordship here read the second plea.) The declaration stated that the plaintiffs, being trustees of a certain friendly society, the defendant, by his bond, became bound to the plaintiffs, as such trustees, in the penal sum of 1400*l.*, subject to a condition that, whereas moneys amounting to 1700*l.*, were stated to be due and owing from one John Stimson to the plaintiffs, as such trustees, and it had been agreed between the plaintiffs and John Stimson and the defendant, that the defendant should secure to the plaintiffs 700*l.* as part of the said debt of 1700*l.*, then, if the defendant before a day named (and which elapsed before action), should pay to the plaintiffs 700*l.*, the said bond should be void, and so forth. The defendant, by his second plea, alleged, that before the making of the bond, Stimson had been secretary and treasurer to the said friendly society, and there was a deficiency in his accounts, as such secretary and treasurer, of a sum of 1700*l.*, which appeared by the society’s books to be due from Stimson to the trustees of the society, and the said trustees had caused a warrant to be issued for the apprehension of the said Stimson, with a view to proceeding criminally against him for an alleged felony in respect of the said money appearing by the said books to be due from him to the said trustees; and thereupon it was agreed between the said trustees and the defendant, and certain other persons on behalf of the said Stimson, that instead of proceeding criminally against the said Stimson, the said trustees should accept 1000*l.* in cash, in payment of a part of the said deficiency, and take the defendant’s bond for 1400*l.*, as security for payment of the remaining 700*l.* thereof, and it averred that the bond sued on was delivered and accepted by the said trustees in pursuance of the said illegal agreement, and upon and

for no other consideration. In his third plea, pleaded as a defence on equitable grounds, the defendant repeats the allegations in the second plea to the effect that Stimson had been secretary and treasurer to the society, and that there was a defect in his accounts, in respect of which the said trustees alleged that he had committed a felony, and had caused a warrant to be taken out for his apprehension. And the said third plea further alleges that the said bond was executed and delivered by the defendant to the plaintiffs upon and subject to certain terms and conditions then agreed upon between the trustees and the defendant and other persons on behalf of Stimson, namely, that all prosecution by the said society or by any of its members should cease. Now Mr. Gates has contended that that was an illegal agreement, and I am of opinion that he is right in so contending, and that such an agreement is illegal. The latter part of the plea shows that some parties, members of the society, prosecuted Stimson, who was tried and acquitted of the several charges preferred against him. Now I think that if that be not a good answer in equity to this action that it ought to be so, and it seems to me to be very like the case of a man giving a bond for 1000*l.* to a man whom he believes to be about to marry a given young lady, and giving it to him on that express ground and for that reason solely, where surely it would be contrary to equity, supposing the obligee of the bond to break the engagement and decline to marry the lady, that he should sue the obligor on the bond, he himself having failed to perform that which was the very substance of the matter, and in fact and truth the consideration for the bond having been given. At all events, as I have said, if it be that a court of equity would not interfere to give relief against an action on the bond in such a case, I think that it ought to do so, but I give no judgment in this case upon that point, as I am of opinion that the third plea shows that the bond was given upon an illegal agreement, and that it is a good plea upon that ground.

CHANNELL, B.—I also think that the defendant's third plea is good, and an answer to the action, irrespective of the question whether or not the agreement was broken. The questions for our decision here are whether the agreement stated in the third plea as amended is illegal or not; and then, whether it be illegal or not, whether it was broken. Now I am of opinion, and for the reason given by my brother Martin, that the agreement in consequence of which the bond was given was an illegal agreement, and that the bond was given to secure an illegal object. With regard to the second plea I rather think that that also is good.

CLEASBY, B.—I am of the same opinion. I think both these pleas are good, because they both show that the bond was given expressly in order to stifle a prosecution. The agreement, therefore, under which the bond was given was one contrary to public policy. Both the pleas state that the plaintiffs had caused a

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warrant to be issued for the apprehension of Stimson with a view to proceeding criminally against him for an alleged felony, and that then an agreement was come to between the plaintiffs and the defendant that instead of the plaintiffs so proceeding criminally against Stimson the defendant should give his bond to the plaintiffs for the sum of money therein mentioned, and now sought to be recovered, and that all prosecution of Stimson by the said society or any of its members should cease. Now when we are dealing with an illegality of this nature we must look to the effect and substance of all the words used more than to the very precise words themselves. Here the plaintiffs were about to prosecute this man for an alleged felony, and then this bond was given as an inducement to them to refrain from so prosecuting. I think that both these pleas are good.

*Judgment for the defendant on both pleas.*

Attorneys for the plaintiffs, *Shaen and Roscoe.*

Attorneys for the defendant, *Brundrett, Randall, and Govett.*



## NORTHERN CIRCUIT.

## MANCHESTER ASSIZES.

*August 2, 1870.*

(Before Baron CLEASBY.)

REG. v. THE BURY IMPROVEMENT COMMISSIONERS.(a)

*Recognizances—Power of judge to discharge defendant from—  
Corporate body.*

*When two defendants, members of a corporate body, entered into their recognizances to appear and plead to an indictment for non-repair of a highway, the judge ordered them to be discharged from such recognizances on the ground that they were entered into per incuriam.*

THIS was an application before Baron Cleasby, sitting in the Crown Court, to discharge Mr. Holt and Mr. Walker, two members of the Bury Improvement Commission, from their recognizances, which they had entered into at the last assizes, held at Manchester, under an order from Mr. Justice Brett; the circumstances of the case were as follows:—

An indictment was ordered to be preferred against the Bury Improvement Commissioners for non-repair of a highway.

The grand jury found a true bill against them at the last assizes, and a bench warrant was issued against two of the commissioners, Mr. Holt and Mr. Walker, by Mr. Justice Brett, under which they were arrested; and, on coming before the judge, he ordered them to enter into their recognizances to appear personally and to plead at the next assizes to the indictment.

*Hopwood* for the prosecution.

*Holker*, Q.C. (with him *Bayliss*) for the defendants.

*Holker*, Q.C., now applied that the two defendants should be discharged from their recognizances, and from appearing and pleading to the indictment, on the ground that they had no power to appear personally and plead, as they were members of a corporate body, the case being unlike that of the inhabitants of a township or parish, some of whom can appear and plead personally to an indictment on behalf of the other members of

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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the parish ; but a corporation can only plead by attorney, which can only be done after removal by *certiorari* to the civil side, and that as there can be no appearance by attorney at sessions or Crown side of assizes, they are unable to enter any appearance, but the indictment should be removed by *certiorari* to the civil side, where they could appear by attorney ; therefore, under these circumstances, the two defendants were entitled to be discharged from their recognizances on the ground of their having entered into them *per incuriam*, for the bench warrant was issued *ultrâ vires*.

*Hopwood*, for the prosecution, contended that by the 96th section of the Bury Improvement Act there was a distinct provision for a case of this sort. The words of the section were : "And be it enacted that the commissioners *shall be liable to be indicted* for the want of, or the sufficient repair of, the public highway within the limit of this Act *in the same manner* as the inhabitants of the said place were liable before the passing of this Act ;" that the defendants, therefore, as members of the Bury Improvement Commissioners, were liable to be indicted, and could appear, enter into their recognizances, and plead as two inhabitants of a township or parish would have to do ; that to say they could not would have the effect of making the 96th section quite useless.

CLEASBY, B., said it was a question of some importance, and he would give judgment the next day. . On the following day, therefore, the learned judge delivered the following judgment : This is an application to discharge certain gentlemen from performing the condition of their recognizance to plead to a certain indictment, upon the ground that the recognizance had been entered into *per incuriam*, and under a mistake, as it were, that it was in fact to do something which they could not do. The case arose on an indictment against the Bury Improvement Commissioners for the non-repair of a street. Looking at the Act of Parliament, I find that it is quite clear that these commissioners, by their Act, are made a body corporate in perpetual succession under the common seal, which was therefore a corporation in every sense of the word. The consequence is that they cannot plead here because they cannot plead in person, being a body corporate ; and they cannot plead by attorney here because, although they can appoint an attorney, the attorney cannot plead for them in this court. Therefore, unless there is something in the Act of Parliament to enable two of the commissioners or any member of them to plead in a body for a corporation, the condition of these recognizances cannot be performed. The case had been properly argued on that ground. It is said that the 96th section of the Act of Parliament makes this case an exceptional one, and that there was a special clause enabling them to plead for the corporation. The section says, "And be it enacted, that the commissioners shall be liable to be indicted for the want of or for the sufficient repair of the public highway, within the limit of this Act, in the same manner as the inhabitants of the said place were before the

passing of this Act." It was argued that before the passing of this Act the inhabitants were liable; and because before the passing of this Act the inhabitants could plead by two of them, the effect of this clause, in other words "in the same manner," was to enable this corporation to plead by two or any number of the commissioners. I am of opinion that that is not the proper construction of the clause. It appears to me that they cannot plead to this indictment, which was not an indictment against them, but it was an indictment against the corporation; it is, therefore, only right that I should accede to the application made to me to discharge them from performing their recognizances.

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*Recognizances discharged.*

## NORTHERN CIRCUIT.

*December 2, 1870.*

(Before Mr. Justice BRETT.)

REG. v. STOPFORD.(a)

*Wounding—Grievous bodily harm—Intent.*

*An indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm is good, although it is proved that he mistook A. for somebody else.*

Reg. v. Smith (1 Oox Crim. Cas. 51) followed; Reg. v. Hewlett (1 F. & F. 91) overruled.

**J**OHAN STOPFORD was charged with having, on the 22nd of October, at Gorton, wounded James Haley, with intent to do him grievous bodily harm.

*T. Gorst* for the prosecution.

*Oottingham* for the defence.

The prisoner on the night in question was drinking with some men at a public-house, near Gorton, and with whom he had been fighting and quarrelling; he, however, left the public-house by himself, and went down a lane to go home; as he was going down the lane he was attacked by some men, who threw him down and otherwise illtreated him; he got up and pursued them

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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in the direction of the public-house, but he was not able to recognise them, owing to the fact of it being a very dark night. As he approached the public-house he saw the prosecutor, James Haley, outside the public-house, and, believing him to be one of the men who had attacked him, he stabbed him with a pocket knife; there was no doubt that he did not know who James Haley was when he stabbed him, as he had parted from him a few minutes before in the public-house on the best terms, where he had been drinking with him. This being the case for the prosecution, at the close of it.

*Cottingham* contended that the offence charged had not been proved. The indictment charged the prisoner with wounding James Haley, with intent to do him, James Haley, grievous bodily harm; the special intent must be proved as laid; here it was not proved; it was admitted by the prosecution he never intended to wound James Haley, but somebody else. He no doubt did wound James Haley, and he might be convicted of the misdemeanor, but he could not be convicted of the felony charging the intent to do grievous bodily harm to James Haley. To support this view he cited *Reg. v. Hewlett* (1 F. & F. 91), in that case it was held that where the prisoner struck at A., but B. interposing received the blow and was wounded, he could not be convicted of wounding with intent to do B. grievous bodily harm; he also cited *R. v. Ryan* (2 M. & Rob. 213).

BRETT, J.—I shall ask the jury whether the prisoner intended to do grievous bodily harm to the man who was before him? If he did he is guilty, although he mistook him for another man.

*Cottingham*.—It has been proved that the prisoner was drunk, and drunkenness will go far to prove that there was no special intent.

BRETT, J.—If he was merely so drunk as to put himself in a passion, drunkenness would be no excuse; he must have been so drunk as to be incapable of knowing what he was doing, and this is a question for the jury.

The objections were accordingly overruled.

BRETT, J., in summing up to the jury: It has been said by the counsel for the prisoner that he, the prisoner, did not know who it was that he struck; that he never intended to strike the prosecutor, but somebody else. But I shall ask you this question: Did the prisoner intend to do grievous bodily harm to the man he saw before him, not thinking at the time that it was James Haley? If he did intend to strike the man he saw before him, although he might have considered him to be somebody else, he is guilty. He is also guilty notwithstanding his drunkenness, for, unless he was so drunk that he was utterly and consequently incapable of having any intent, and merely struck wildly about, and in so doing struck the prosecutor, he is guilty; mere drunkenness which excites a fearful rage is no excuse.

*Guilty—Five years.*

*Cottingham* asked the learned judge to reserve the point.

BRETT, J., said, though he had no doubt in his own mind about the law, he would consider the point raised by Mr. Cottingham. Next morning, after saying that he adhered to the opinion he expressed the day before, the learned judge said, I doubt the case of *Reg. v. Hewlett*, as it appears to me inconsistent with *R. v. Hunt* (1 Moo. C. C. 93); it seems to me to be only partially reported, a bald report in fact; *Reg. v. Smith* (1 Cox Crim. Cas. 51) is precisely in point. The way therefore I have directed the jury is right, and I decline to reserve the point. I have consulted Mr. Justice Mellor, who agrees with me.

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## NORTHERN CIRCUIT.

### LIVERPOOL ASSIZES.

August 20, 1870.

(Before Mr. Justice LUSH.)

REG. v. TYMMS.(a)

*Power of judge to amend indictment—Perjury—14 & 15 Vict.  
c. 100, s. 1.*

*Where the indictment stated that the prisoner had committed perjury at the hearing of a summons before the magistrates charging a woman with being "drunk," whereas the summons was really for being "drunk and disorderly," the Court held that it had power under 14 & 15 Vict. c. 100, s. 1, to amend the indictment by adding the words "and disorderly."*

**R**EUBEN TYMMS was indicted for having, at Warrington, on the 30th of May, at the hearing of a summons before the magistrates, charging a woman named Barbara Foster, with being drunk, committed wilful and corrupt perjury.

*Oottingham* for the prosecution.

*Torr* for the defence.

The perjury was alleged to have been committed under the following circumstances: The prisoner was a policeman at Warrington, and he was a witness at the hearing of a summons charging a woman named Barbara Foster with being drunk and

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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disorderly on the 24th of May last. The magistrates dismissed the case, as she called four or five witnesses who proved that she was neither drunk or disorderly; she then preferred the present charge of perjury against the prisoner.

The clerk to the magistrates produced the summons which charged Barbara Foster with being drunk and disorderly.

*Torr* objected to the indictment as being bad, for not stating precisely the real nature of the offence. The indictment stated that the offence with which Barbara Foster was charged was with "being drunk," whereas the summons stated the offence to be drunk and disorderly; being drunk was an offence under 21 Jac. 1, c. 1. But being drunk and disorderly was an offence under 10 & 11 Vict. c. 89, s. 29; thus they were offences of an entirely different kind, and it was therefore a material allegation, and ought to have been correctly stated.

*Cottingham* submitted that, although the offence of being drunk was different from that of being drunk and disorderly, the learned judge had power, under 14 & 15 Vict. c. 100, s. 1, which enacts that whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in the name or description of any matter or thing whatsoever therein named or described, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence, on such merits to order such indictment to be amended; the learned judge, therefore, had power to amend this indictment, and order the words "and disorderly" to be added, as the prisoner could clearly not in any way be prejudiced by such amendment. He cited *Reg. v. Neville* (6 Cox Crim. Cas. 69).

*Torr* contended that the learned judge had no such power, as it would be an amendment which altered the nature and quality of the offence, and this he had no power to do. He cited *Reg. v. Wright* (2 F. & F. 320).

LUSH, J., decided that he had power to amend the indictment, as it would not prejudice the prisoner on the merits of the case, and declined to reserve the point.<sup>(a)</sup> The indictment was accordingly amended, and the words "and disorderly" were added.

(a) The learned judge at the trial having said that he would consider whether he would reserve the point, the reporter was favoured with a note from his lordship, saying he had considered the question, and had no doubt that he had power to amend the indictment, and would not, therefore, reserve the point, and that he had consulted Baron Cleasby, who was also of the same opinion.



## COURT OF CRIMINAL APPEAL.

November 19, 1870.

(Before KELLY, C.B., CHANNELL, B., KEATING, J., BRETT, J., and  
CLEASBY, B.)

REG. v. WALNE.(a)

*False pretences—Cheque not to be presented until a future day—  
Direction to jury.*

*Prosecutor agreed to sell a mare, warranted sound, to the prisoner for 20l. 10s. Prisoner came and took the mare away on a Thursday, giving a banker's cheque for the price, which, at the request of the prisoner, the prosecutor agreed not to cash till Saturday. Prosecutor, however, paid this cheque to his bankers on the same Thursday; they returned it to him on the Saturday indorsed "no account." It was proved that the prisoner had no effects at the bank on which the cheque was drawn on the Saturday, or on any day for a long time previously. For the prisoner, B., a witness, proved that he had requested prisoner to buy a horse for him (B.), and that prisoner had told B. that he thought he knew of a mare that would suit, and asked B. for a cheque, which B. did not give, as he had not his cheque book with him; that the prisoner, on the Monday after the said Saturday, told B. he had bought a horse for him for 20l. 10s.; and that B. sent a cheque to him on the following day for the amount. On the Wednesday the mare was sent back to the prosecutor, with a veterinary certificate that she was not sound, a summons against the prisoner having been taken out by the prosecutor and left at the prisoner's house on the previous Monday.*

*At the close of the evidence prisoner's counsel contended that the prisoner ought to be acquitted, first, because, the prosecutor having broken the contract, the charge of false pretences could not be maintained; secondly, because there was no false pretence of an existing fact, as the prisoner did not allege he had funds at the bank at the time he drew the cheque; thirdly, because upon B.'s evidence the prisoner had reasonable cause to believe that the cheque would be paid on the Saturday.*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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*The Court overruled the objections, and directed the jury that if they believed that the prisoner knew he had no funds at the bank at the time he gave the cheque, and that the prosecutor had parted with the mare upon the belief that the cheque was a good and valid one, they must find the prisoner guilty.*

*The jury thereupon found the prisoner guilty :*

*Held, that the direction to the jury was wrong, and that the case ought not to have been left to them, and that the conviction ought to be quashed.*

CASE reserved for the opinion of this Court at the Norfolk General Quarter Sessions, Michaelmas, 1870 :—

Daniel Walne was indicted and tried before me at the General Quarter Sessions for the county of Norfolk, held at Norwich on the 19th of October, 1870, for that he did unlawfully and knowingly, by a certain false pretence, obtain from Richard Francis Hinde, a bay mare of the value of 20*l.* 10*s.*, the property of the said Richard Francis Hinde, with intent to defraud him of the same.

It was proved that on Tuesday the 20th of September, 1870, the prosecutor had a sale of his stock, and amongst the horses offered for sale was a bay mare, which was not sold, but bought in by him. That later in the day he had a conversation with the prisoner, who said if he would give him a piece of paper to say that the mare was sound he would take her at 20*l.* 10*s.* This the prosecutor agreed to, and gave the required warranty, saying at the same time that the prisoner could pay for the mare when he took her away. That the next day the prisoner came to the prosecutor and offered to pay for the mare, but as he was not sober the prosecutor refused to be paid then. No money, however, was tendered. That on the day following (Thursday) the prisoner came to the prosecutor's house and took out a cheque book and drew a cheque on the National and Provincial Bank at Norwich, for 20*l.* 10*s.* When going away the prisoner said, "Don't get this cashed till Saturday," to which the prosecutor seems to have agreed, though no reason was given for the request. That notwithstanding the above-mentioned request, the prosecutor paid the cheque into his own bankers, Messrs. Gurney and Company, on the same day, and on Saturday received it back with the words written on it "No account." That the prosecutor on the Saturday, the day up to which the prisoner had requested him to let the cashing of the cheque stand over, went to the National and Provincial Bank, and ascertained that the prisoner had no effects at the bank, either on that day or on the day on which the cheque was drawn. That on the following Monday prosecutor applied for a summons against the prisoner, which was left at the prisoner's house the same morning, the prisoner being at Bungay fair, some ten miles off, at the time. That the mare was brought back to the prosecutor on the following Wednesday by the prisoner, who alleged that the mare

was unsound, and produced the certificate of a veterinary surgeon to that effect.

The prosecutor also swore that he would not have parted with the mare had he not believed the cheque to be a good and valid one.

A clerk from the National and Provincial Bank proved the fact of there being no effects of the prisoner's at the Bank, and that the last cheque drawn by the prisoner was on the 16th of September, 1868, and on the 5th of December of the same year the account was closed, the prisoner's aunt, who had agreed to be surety for him, having paid the balance (104*l.* 5*s.*) which was due from the prisoner to the bank. There was, however, no proof that the prisoner had received formal notice of this payment, or that his account was closed, or that his cheques would not be honoured.

John Bryant, a dealer, was called on behalf of the prisoner, and stated that prior to the 20th of September, 1870, he had requested the prisoner to purchase a horse for him. That on Wednesday, the 21st of September, he saw the prisoner, who told him he thought he knew of a mare which would suit him, and asked him to give him a cheque without filling in any amount, which he did not do, but would have done if he had had his cheque book with him. That on the following Monday he met the prisoner at Bungay fair, who informed him that he had bought a horse for him, and stated that the price was 20*l.* 10*s.* That he did not give the prisoner the money that day, but sent a cheque the following morning, which cheque was produced in court.

The prisoner's counsel contended—First, that inasmuch as the mare was obtained through the medium of a contract between the prisoner and the prosecutor, which contract the prosecutor had broken, the charge of false pretences could not be maintained; secondly, that this was not a false pretence as to an existing fact, as the prisoner did not allege that he had funds at the bank at the time he drew the cheque; thirdly, that upon the evidence of Bryant the prisoner had reasonable and probable cause for believing that the cheque would be paid on the Saturday, and that I was bound to tell the jury so.

I overruled the objections, and refused to leave the case to the jury in the way suggested, but directed them that if they believed that the prisoner knew he had no funds at the bank when he gave the cheque, and that the prosecutor had parted with the mare under the belief that the cheque was a good and valid one, they must find the prisoner guilty.

The jury found the prisoner guilty, and I discharged the prisoner, on bail, until the opinion of the Court for Crown Cases Reserved be taken as to whether the prisoner was rightly convicted or not.

ROBERT THORNEAGH GURDON,  
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*Metcalf* (*Mayd* with him) for the prisoner.—The conviction cannot be sustained. The objections of the prisoner's counsel at the trial were overruled by the Court, and the jury were told that if they believed that the prisoner knew he had no funds at the bank when he gave the cheque, and that the prosecutor had parted with the mare under the belief that the cheque was a good and valid one, they must find the prisoner guilty. That direction was clearly wrong. [He was then stopped by the court.]

No counsel was instructed for the prosecution.

KELLY, C.B.—It is impossible to sustain the conviction. When the prosecutor parted with the mare, and the prisoner gave the cheque, there was no false statement of any existing fact. All that the jury find is that the prosecutor would not have parted with the mare if he had not believed that the cheque was a good and valid one. Upon the facts the prisoner might have believed, at the time he gave the cheque, that if the prosecutor had gone to the bank on the Saturday it would have been paid.

CHANNELL, B.—I also think the conviction should be quashed. The case ought to have been withdrawn from the jury, on the objections urged by the prisoner's counsel.

KEATING, J., concurred.

BRETT, J.—I also think the case ought not to have been left to the jury.

CLEASBY, B., concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*January 21, 1871.**(Before KELLY, C.B., CHANNELL, B., KEATING, J., BRETT, J.,  
and CLEASBY, B.)**REG. v. DUNNING.(a)**Perjury—Indictment.*

*An indictment for perjury committed at quarter sessions alleged "that at," &c., "a certain indictment for misdemeanor, in which A. was prosecutor and B. and C. defendants, came on to be tried in due form of law, and was then and there tried by a jury, &c., upon which said trial the now defendant appeared as a witness, and was then duly sworn before the justices," &c.*

*Held, upon an objection that the court before which the perjury was committed had no jurisdiction, because the indictment did not show the misdemeanor to be one triable at quarter sessions, that the indictment sufficiently alleged the substance of the offence charged against the now defendant, and that the court had competent authority to administer the oath.*

**C**ASE reserved for the opinion of this Court by Baron Pigott.

The prisoner Henry Dunning was tried and convicted before me at Shrewsbury, at the last Summer Assizes, upon an indictment for perjury, which alleged in substance as follows, viz. :

Shropshire, {The jurors for our Lady the Queen upon their  
oath present, that heretofore—to wit, at the  
General Quarter Sessions of the peace of our Sovereign Lady the  
Queen, holden for the county of Salop, on the 28th of June, 1870,  
at the Shire Hall, in Shrewsbury, in the said county, before Sir  
Baldwin Leighton, Bart., Sir William Curtis, Bart., and others,  
their associates, Her Majesty's justices of the peace, assigned to  
keep the peace in the county aforesaid, and also to hear and  
determine divers felonies, trespasses, and other misdemeanors in  
the same county done and committed, a certain indictment for  
misdemeanor, in which John Davies, of the Bull's Head, Lawley  
Bank, in the said county, was the prosecutor, and Isaac Rowlands  
and John Davies were the defendants, came on to be tried in due

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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form of law, and was then and there tried by a jury of the country, in that behalf duly sworn, between the parties aforesaid, upon which said trial Henry Dunning appeared as a witness for and on behalf of the said Isaac Rowlands and John Davies, the defendants in the indictment aforesaid, and was then duly sworn and took his corporal oath upon the Holy Gospel of God, before the said Sir Baldwin Leighton, Bart., Sir William Curtis, Bart., and others, their associates, so being such justices as aforesaid, that the evidence which he, the said Henry Dunning, should give to the court there, and the said jury so sworn as aforesaid, touching the matter then in question between the prosecutor in the said indictment and the defendants therein, should be the truth, the whole truth, and nothing but the truth.

Then, after averments of materiality, it is further presented, that the said Henry Dunning falsely, &c., deposed and swore, &c.

Whereas, &c. (here follow the negatives and the formal conclusion that Henry Dunning so committed perjury.)

It was proved that the indictment was for an offence against the person under sect. 20 of 24 & 25 Vict. c. 100.

At the conclusion of the case for the prosecution it was objected by counsel for the prisoner that the indictment was bad, in not stating what the misdemeanor was, or that it was one triable at Quarter Sessions.

I reserved this for the consideration of this Court, and accepted bail for the prisoner.

G. PIGOTT.

The Hon. *Evelyn Ashley* for the prisoner.—The conviction cannot be sustained. The indictment is bad for not showing the jurisdiction of the court in which the perjury is alleged to have been committed. The indictment only states that a certain indictment for misdemeanor, to which the defendant was a party, came on to be tried before the court of Quarter Sessions; it sets out no particulars, and does not show that it was a misdemeanor that the court of Quarter Sessions had power to try. [KEATING, J.: It alleges that it came on to be tried in due form of law.] That averment would be satisfied by showing that the court had all the usual formalities, such as a judge and proper officers, but it is not a sufficient averment of jurisdiction. The indictment should have set out the ingredients of the offence, so that it would appear that the Quarter Sessions had jurisdiction to try it. [CHANNELL, B., referred to the 14 & 15 Vict. c. 100, s. 20, which enacts, “in every indictment for perjury, &c., it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath, &c., was taken, &c., without setting forth the indictment, &c., and without setting forth the commission or authority of the court before which such offence was committed.] That provision still requires the substance of the indictment to be set out, and *Rex v. Callanan* (6 B. & C. 102) is a decision to the same effect before the statute.



In *Reg. v. Overton* (4 Q. B. 83), where an indictment for perjury alleged that a certain appeal came on to be tried in due form of law before commissioners of assessed taxes, it was held that the indictment did not sufficiently show that it was a judicial proceeding, and that it did not sufficiently state the substance of the offence, according to the 23 Geo. 2, c. 11, s. 1. In *Reg. v. Harvey* (8 Cox Crim. Cas. 99), it was held that the materiality of the false evidence assigned must be apparent on the face of an indictment for perjury, and that the 14 & 15 Vict. c. 100, s. 20, does not cure the want of it. [CLEASBY, B., referred to *Lavey v. The Queen* (5 Cox Crim. Cas. 259 ; 17 Q. B. 496), where an indictment for perjury committed in a county court only alleged that a certain action came on to be tried before the judge of the said court, and was in due form of law tried, upon which trial Lavey was duly sworn as a witness before the said judge, "then and there having sufficient and competent authority to administer the said oath:" and it was held that, although there was no express averment that the oath was administered in a judicial proceeding over which the court had jurisdiction, the averment was by necessary intendment involved in the allegation that the judge had sufficient authority to administer the said oath.] By the 5 & 6 Vict. c. 38, the court of Quarter Sessions is restrained from trying a large number of offences, and therefore it was essential to show that the offence, upon the trial of which the perjury was alleged to have been committed, was one within the jurisdiction of the court of quarter sessions; and although it need not be expressly averred that the court had jurisdiction to try the offence, yet it should appear upon the face of the indictment that the offence was one triable at sessions. In *Rex v. Dowlin* (5 T. R. 314) it appeared on the face of the indictment that the crime was murder, upon the trial of which the perjury was there committed.

The following cases were also referred to: *Reg. v. Philpott* (1 Car. & Kir. 112); *Reg. v. Fellowes* (1 Car. & Kir. 115); and *Stedman's case* (Cro. Eliz. 137.)

No counsel appeared for the prosecution.

*Cur. adv. vult.*

CHANNELL, B., delivered the judgment of the Court as follows: In this case the prisoner was tried and convicted at the last summer assizes held at Shrewsbury before Pigott, B., for perjury committed on the trial at the general quarter sessions of the peace for the county of Salop, of an indictment for misdemeanor against Isaac Rowlands and John Davies for an offence against the person of John Davies under sect. 20 of 24 & 25 Vict. c. 100. The case at the trial was fully proved in every necessary particular; but it was objected on behalf of the prisoner, and has been argued before us, that the indictment was bad in form, and that the judgment should therefore be arrested and the conviction quashed. The objection taken at the trial was that the indictment did not state what the misdemeanor was, which was alleged to have been tried

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at the quarter sessions, or aver that it was one triable at quarter sessions, *i.e.*, in other words, did not aver that the court of quarter sessions had jurisdiction to try the misdemeanor. This objection, when developed in argument before us, seemed to fall into two objections, first, that the indictment did not set forth the substance of the offence charged upon the defendant; and, secondly, that it did not either expressly aver or show by necessary inference that the court before which the false oath was taken was a competent authority to administer the same. As to the first objection, the indictment alleges that at the general quarter sessions a certain indictment for misdemeanor came on to be tried in due form of law, in which one Davies was prosecutor, and Rowlands and Davies were defendants, and was then and there tried by a jury, &c., and that the prisoner appeared as a witness upon the said trial, and was then duly sworn, &c. The indictment then sets out the matter sworn to by the prisoner, avers its materiality, and negatives its truth and truthfulness. The objection taken is, that it does not state the subject-matter of the indictment for misdemeanor which was tried at the sessions. But that seems rather to point out an alleged defect in not stating the substance of the offence charged against the defendants who were tried at the sessions, than a defect in not stating the substance of the offence charged against the defendant tried at the assizes. The substance of the offence charged against him is, that in a judicial proceeding he swore to the truth of certain facts which are set forth, which at the time of so swearing he knew to be false. "All that it is necessary to state," says Buller, J., in *Rex v. Dowlin* (5 T. R. 311), "is that there was a certain cause, &c., and that it came on to be tried in due form of law, &c." It is true, as pointed out by the counsel for the defendant, that in that case it was alleged that one Kimber was tried upon a certain indictment for murder, &c.; but it seems to us that neither Lord Kenyon, nor Buller, J., rely upon the presence of the words "for murder" in stating the proposition of law, but they mention them only in their relation of the actual facts of that case. In the case of *Rex v. Callanan* (6 B. & C. 102) all that was stated was the substance of what the defendant swore, and that he did so upon affidavit before a commissioner. The indictment did not state the cause for or in respect of which the affidavit was made. Yet Abbott, C.J., says that it set forth "the substance of the matter sworn," using that expression as equivalent to "the substance of the offence charged upon the defendant, and holding the case to be consequently within the stat. 23 Geo. 2, c. 11. In *Lavey v. The Queen* (17 Q. B. 496) the objection taken was that it was not shown that the County Court had jurisdiction over the suit in which the alleged false oath was taken, because the nature of the suit was not sufficiently described. "It was argued," says Parke, B., in the judgment, "that in setting forth 'the substance of the offence' it was not sufficient to state 'the substance of the matter sworn to,' and aver that it was false, and to allege the authority of the judge to

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administer the oath." But the indictment was nevertheless held to be sufficient on the ground that it appeared that there was a judicial proceeding, and that the defendant was sworn and stated certain matter which was false, and that the judge had power to administer the oath. The ground of decision is that the substance of the offence charged upon the defendant sufficiently appeared, and that the court had competent authority to administer the oath. These cases seem to us to be authority for the correctness of the suggestion we have made as to the meaning and construction of the statute, and for holding that in the present case the substance of the offence charged against the defendant sufficiently appears. As to the second point, if the case had depended upon the stat. 23 Geo. 2, c. 11, we should have probably thought that the indictment was insufficient. That statute was passed in order to obviate difficulties in the form of indictments for perjury. It states what it shall be sufficient to set forth, viz., the substance of the offence charged upon the defendant, and by what court and before whom the oath was taken, "averring," it says, "such court or person or persons to have a competent authority to administer the same," with the proper averment or averments to falsify the matter charged, &c., without setting forth, &c." After that statute, the question treated by the courts in every case was whether an indictment contained the averments mentioned in that statute, or their equivalents. If it did, it was good without more. But then, by stat. 14 & 15 Vict. c. 100, passed to relax still further technical forms of indictments, it is enacted in sect. 20 that "in every indictment for perjury, &c., it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom, the oath was taken, &c., without setting forth, &c." It is almost identical in terms with sect. 1 of the 23 Geo. 2, c. 11, except that it omits the words "averring such court or person or persons to have a competent authority to administer the same." This omission seems to us conclusively to show the intention of the Legislature, that this allegation, or its equivalent in the indictment, is a technical strictness which may well be dispensed with, the matter of it being left for proof at the trial. Having then determined that the substance of the offence alleged against the defendant in the present indictment is sufficiently stated, we are of opinion that the indictment contains everything required by sect. 20 of 14 & 15 Vict. c. 100, and is therefore by the express terms of the section sufficient, although it does not contain any express or equivalent averment that the court had competent authority to administer the oath. We are, therefore, of opinion that the indictment was sufficient, and that the conviction in this case was right, and must be affirmed.

Attorney for prisoner, *A. D. Smith.*

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*January 21, 1871.*

(Before BOVILL, C. J., WILLES, J., CHANNELL, B., PIGOTT, B., and HANNEN, J.)

REG. v. HARDY.(a)

*Malicious injuries—Obstructing railway train—Signalling to stop—24 & 25 Vict. c. 97, s. 36.**A person improperly went on a line of railway, and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train. The driver was thereupon induced to diminish the speed from twenty to four miles per hour :**Held, that this amounted to the offence in 24 & 25 Vict. c. 97, s. 36, of unlawfully obstructing an engine or carriage using a railway.*

CASE reserved for the opinion of this Court by Mr. Justice Keating.

The defendant was tried before me at Bedford, on the 26th of July, 1870, upon an indictment under 24 & 25 Vict. c. 97, s. 36, which charged in the first count that by a certain unlawful act, to wit, by unlawfully interfering with and changing, and by making and showing certain signals upon a certain railway, to wit, the Midland Railway, he unlawfully and wilfully did obstruct and cause to be obstructed an engine and carriages then using the said railway, against the statute, &c.

The second count charged generally that he did unlawfully and wilfully obstruct and cause to be obstructed an engine and carriages then using the said railway, against the statute, &c.

At ten a.m., on the 24th of May, 1870, the defendant requested the signalman at the Luton station to stop the goods train then coming towards it, on its way to Leagrave, two and a half miles nearer to Bedford, to which latter place he was anxious to proceed in order to catch a passenger train. The signalman refused to do so, and referred him to the station master, who also gave a like refusal. The defendant then proceeded along the line towards Leagrave, 700 or 800 yards, and the goods train

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

approaching him, having passed the Luton station, he placed himself on the space between the two lines of railway and held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. The defendant knew that his doing so would probably induce the driver to stop or slacken speed, and his intention was to produce that effect. The driver, supposing him to be an inspector shut off steam, diminishing the speed gradually from twenty to four miles an hour, and the defendant, when the train came up at that speed, jumped into the guard's van, and the train, without actually stopping, proceeded onwards towards Leagrave at its usual pace. The delay caused by shutting off the steam and diminishing the speed, was about four minutes, and the station-master stated that if the goods train had not, on that occasion, been before its usual time, the delay of four minutes would have obliged him to stop the next passenger train, if punctual to its time. No actual delay in that respect, however, took place.

The defendant was a season-ticket holder, but had no right, as such, to travel on a goods train.

On the authority of the case of *Reg. v. Hadfield* (*ante*, 574), I told the jury that if they found the facts as stated, the case was one of obstruction within the 36th section of 24 & 25 Vict. c. 97.

The defendant was, therefore, found guilty; but as in the case referred to the act was one of an interference with the signals of the company, I desire to know whether I was right in extending that decision to the present case.

If so, the conviction to be affirmed, otherwise quashed.

H. S. KEATING.

No counsel appeared for the prisoner.

*Merewether*, for the prosecution.—The conviction was right. The case comes within the decision of *Reg. v. Hadfield*, where the going on to a railway and altering the signals, and so causing an engine-driver to slacken the speed of a train from a fast to a very slow rate, was held to be an obstruction of an engine or carriage using a railway within the 36th section of the 24 & 25 Vict. c. 97. It is a well-known mode of signalling to engine-drivers to stop a train by inspectors and workmen on the line to go upon the line, as the defendant did, and hold up both arms. This was indeed a more dangerous act than altering the signals, as in *Reg. v. Hadfield*, because the altered signals can be seen by each train in succession, whereas the succeeding train could have no notice that the speed of the train in advance had been checked by the holding up his hands by a person on the line. The defendant was indicted upon sect. 36, the misdemeanor section, which enacts that "whosoever by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor." That the act done by the prisoner was an unlawful act is manifest from sect. 35 (the felony section), which

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specifies a series of acts in these terms: "Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony." The prisoner's holding up his arms on the line of rails was showing a signal which obstructed the progress of the train, and so was an unlawful act within sect. 36.

BOVILL, C.J.—Upon the facts in this case there can be no doubt that the defendant made a signal by holding up his arms in the mode adopted by inspectors and other officials to induce engine-drivers to stop a train, or slacken its speed. And there can be no doubt that the defendant did obstruct the goods train then coming, by causing the driver to diminish its speed from twenty to four miles an hour. This was an obstruction other than a physical obstruction, and the question is whether sect. 36 contemplates other than physical obstructions. If the words in sect. 36 had been obstruct "any line of railway," there might be some ground for saying that what the defendant did was not an obstruction of the railway, but the words are obstruct "any engine or carriage using any railway." Although sect. 36 does not enumerate any particular acts of obstruction, but simply says "by any unlawful act or by any wilful omission or neglect shall obstruct," yet it seems to me from the use of the words "wilful omission or neglect" that it did not contemplate a mere physical obstruction, but that it was intended to meet the case of a railway servant who should wilfully omit or neglect to do his duty, and thereby cause an obstruction to an engine or carriage using a railway. If it had depended on sect. 36 alone, I should have thought that the section did not mean obstruct by some physical obstruction merely, but all doubt is removed when reference is made to sect. 35 (the felony clause). In sect. 35 certain acts are enumerated, some of which would create a physical obstruction, as putting wood or stones upon the line of railway; but there are others, such as "making or showing, hiding or removing, any signal or light, or unlawfully and maliciously doing any other matter or thing," which would apply to other than physical obstructions. Such being the construction to be put on sect. 35, I am of opinion that sect. 36 must receive the same construction. The words "by any unlawful act," in sect. 36, must include all the acts enumerated in sect. 35. If, then, sect. 36 is not con-



finer to cases of mere physical obstruction, the present case falls within it. It comes within the same principle as *Reg. v. Hadfield*, for here the defendant made a signal and obstructed the train within the meaning of the Act. The conviction must therefore be affirmed.

The rest of the Court concurring,

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*January 21, 1871.*

(Before BOVILL, C.J., WILLES, J., CHANNELL, B., PIGOTT, B., and HANNEN, J.)

REG. v. HARRIS AND COCKS. (a)

*Indecent exposure in a public place—Urinal.*

*The prisoners committed a gross act of lewdness in an inclosed urinal, divided into compartments, adjoining to a public footway in a public park. The public had access to the urinal:*

*Held, that the urinal was a public place, and that the commission of the indecency therein was indictable.*

CASE reserved for the opinion of this Court by the Assistant Judge at the Middlesex Sessions on the 23rd of November, 1870.

Samuel Harris and Henry Cocks were tried before me upon the following indictment:

Middlesex. { The jurors for our Lady the Queen upon their oath present, that Samuel Harris and Henry Cocks, on the 10th of October, in the year of our Lord, 1870, in a certain urinal frequented and resorted to by many of the liege subjects of our Lady the Queen for a necessary purpose, and in a certain open and public place, called Hyde-park, situate in the parish of Saint George, Hanover-square, in the county of Middlesex, and near and adjacent to a certain highway and footpath there situate, and in the sight and view of many of the liege subjects of our said Lady the Queen then and there being, and then and there passing and repassing, did meet together for the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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purpose of committing with each other divers lewd and unnatural practices, and did then and there commit and perpetrate with each other divers such practices as aforesaid; and that he the said Samuel Harris did then and there in such open and public place as aforesaid, and within the sight and view of such persons as aforesaid, unlawfully and wickedly expose, [Then followed a specific averment of the lewd practices.] To the great damage and common nuisance of all the liege subjects of our said Lady the Queen then and there being and then and there passing and repassing, against the peace of our said Lady the Queen, her crown, and dignity.

Complaints having been made to the police of practices at the urinal in question, two police-constables in plain clothes were directed to watch the place, and on the 10th of October, between three and four o'clock in the afternoon, they found the two prisoners in the urinal. They were standing facing each other, but, on seeing the officers, each prisoner retired into one of the compartments in the urinal.

The police officers then went to the further end of the urinal where there were openings enabling them to see into the urinal; they then saw Harris leave the compartment which he had previously entered and go to the compartment in which Cocks then was; Cocks turned round to Harris, and the acts of indecency specified in the indictment were committed.

The officers then ran round to the principal entrance, and took both prisoners into custody in the urinal.

The urinal is open to the public, and is situate in Hyde-park, near to a lodge, the window of which on a first floor commands a view of the urinal, the distance between the lodge and the urinal being 14ft. 6in.

The urinal is approached by a gate opening from the public foot-path, and there is also access to it by another gate communicating with a small garden belonging to the lodge.

Harris pleaded guilty to the whole charge, and I told the jury that, for the purpose of the trial, they might, if they believed the evidence, find Cocks guilty upon the first count, but they must be satisfied that the prisoners had the intention imputed to them by the second count, before they could justifiably return a verdict of guilty on that count.

The jury found Cocks guilty on the first count, and not guilty on the second count.

Sentence was postponed that the opinion of this Honourable Court might be obtained, and in the meantime both prisoners were discharged on bail.

The question I have to submit to this Honourable Court is, whether, in point of law, the conviction of Cocks can be sustained?

If this question is determined in the affirmative, the conviction is to be affirmed, and the Court of Sessions may proceed to pass

sentence upon both prisoners; but if otherwise, the conviction of both prisoners, notwithstanding Harris's plea of guilty, is to be quashed.

WILLIAM H. BODKIN, Assistant Judge.

*Giffard*, Q.C. (*Moody* with him), for the prisoner Cocks.—No doubt the prisoners committed a gross act of indecency in the urinal; but the question is whether the urinal was such a public place as makes the act an indictable nuisance at common law. This was not a place open to public view; it is divided into compartments and was intended to screen persons from the public gaze. *Reg. v. Orchard* (3 Cox Crim. Cas. 248) is in point. There the indecent act was done in an urinal in Farringdon-market—an inclosure formed of Portland stone, with divisions or boxes like urinals at railway stations. It was open to the public for certain public purposes, but otherwise inclosed. To render an urinal a public place it must be so open to the gaze of the public as to be a public nuisance. [WILLES, J.—Or, in other words, the offence must be so publicly done as to affect two or more of Her Majesty's subjects.] It is no offence that persons use it for a lawful purpose; and in some sense in every such case that is an indecent act. [BOVILL, C.J.—Here I understand from the case that the act was done not in a compartment but in the open part of the urinal. Does a public place cease to be a public place by reason of part of it being partitioned off for a convenient purpose so far as regards the parts so partitioned off?] *Reg. v. Orchard* is an authority that it does. No doubt this point was reserved to give an opportunity of questioning the soundness of the decision in *Reg. v. Orchard*.

*Harris*, for the prosecution, was not called upon.

BOVILL, C.J.—If all the facts had been clearly stated in *Reg. v. Orchard*, and there had been a clear opinion expressed by the Judges, it might have been some authority against a conviction in this case; but the facts are so indefinitely stated that I cannot understand that case. Whatever construction is to be put on that case, I am of opinion that it has no application to the present. The prisoners are charged and convicted of having committed an offence in an urinal frequented by many of the Queen's subjects, in a certain open and public place called Hyde-park, and near to a certain highway and footpath, and in the sight and view of many of the Queen's subjects. The only question reserved is whether there was any evidence on which they could be properly convicted. If the learned Assistant Judge was bound to have told the jury that the urinal was not a public place, the conviction was wrong; but, inasmuch as he was not bound to tell them that, the conviction must stand. Upon the case it appears that this was a public urinal adjoining a public footway, from which there was access to the urinal, and there were what are termed divisions or compartments in it. Such of the public as desire to do so

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may have recourse to it; and it was, therefore, as much a public place as a thoroughfare. Whether it was a place of larger or smaller extent, as, *e.g.*, in a public square or in a court, cannot affect the question whether it was a place of public resort. There is no other point reserved but whether an urinal can be a public place in which an indecent act of this kind can be committed; and we think it is just the class of place to which the law on this subject applies.

The rest of the COURT concurred.

*Conviction affirmed.*

Attorneys for the prosecution, *C. and J. Allen and Sons.*  
Attorneys for the prisoner, *E. Lewis and Co.*

## COURT OF CRIMINAL APPEAL.

*January 21, 1871.*

(Before BOVILL, C.J., WILLES, J., CHANNELL, B., PIGOTT, B.,  
and HANNEN, J.)

REG. v. HARVEY.(a)

*Coining—Having possession of a die—Intent—24 & 25 Vict. c. 99,  
s. 24—Indictment.*

*The 24 & 25 Vict. c. 99, s. 24, makes it a felony to have in custody or possession (inter alia) a die impressed with the apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, without lawful authority or excuse (the proof whereof shall lie on the accused):*

*Held, first, that an indictment under this section should allege possession without lawful authority or excuse, but that an indictment which charged possession without lawful excuse was sufficient, as excuse would include authority;*

*Secondly, that the words "the proof whereof shall lie on the accused" only shift the burden of proof, and do not alter the character of the offence:*

*Thirdly, that the fact that the Mint authorities, upon information forwarded to them, gave authority to the die maker to make the die, and that the police gave permission to him to give the die to the prisoner who ordered him to make, did not constitute lawful authority or excuse for prisoner's possession of the die:*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Fourthly, that it was not necessary to complete the offence that the possession should be with a felonious intent other than knowledge of possession without lawful authority or excuse.*

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CASE reserved for the opinion of this Court by Baron Bramwell:

The prisoner was tried before me at the last winter commission for Warwick, for having in his possession dies, in and upon which were made and impressed the figures and apparent resemblances of the two sides of a sovereign, without lawful authority or excuse.

The following is the form of the indictment:

County of Warwick, { The jurors for our Lady the Queen upon  
to wit. { their oath present, that Walter Foster Harvey, on the 3rd of October, 1870, one die, in and upon which said die was then and there made and impressed the figure and apparent resemblance of one of the sides, that is to say, the obverse side of the Queen's current gold coin called a sovereign, knowingly and without lawful excuse feloniously had in the custody and possession of him the said Walter Foster Harvey, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Walter Foster Harvey, on the 3rd of October, in the year aforesaid, one die, in and upon which said die was then and there made and impressed the figure and apparent resemblance of one of the sides, that is to say, the reverse side of the Queen's current gold coin called a sovereign, knowingly, and without lawful excuse, feloniously had in the custody and possession of him the said Walter Foster Harvey, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

It was proved that the prisoner ordered of a die sinker two dies having an apparent resemblance to the two sides of a sovereign; that they were made for him, and paid for by him; that he received them from the maker, and that when taken into custody they were found on him.

Besides other evidence the following was given:—

Barham, the maker of the dies, said that on the order being given he communicated with the police, with a police officer named Glossop.

On cross-examination he said: Two days after the prisoner came I told the police. They said they would inform the people in London. Glossop told me to go on. I obtained permission of Manson (another police officer), or Glossop, to give them to the prisoner. I should not have given them up without that permission.

Manson, a police officer, deposed: Glossop was spoken to first,

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and spoke to me. I communicated with Gem. He is an attorney and conducts this case. I have received communications from Gem. Gem told me he had communicated with the Mint in London. Barham had his orders from Glossop. I gave Barham permission to give the dies to the prisoner. This was in consequence of orders from London.

The prisoner's counsel contended that I ought to rule or leave to the jury to say that this constituted lawful cause or excuse. He also contended that the prisoner ought not to be convicted unless he had a guilty mind, and that if he had no guilty intention in reference to the possession and use of these dies (as to which there was evidence both ways), he was not guilty, and that I ought to leave this to the jury.

He further contended that the indictment was bad, on the ground that it does not negative lawful authority as well as lawful excuse.

I refused to direct an acquittal, and said I should leave to the jury no other questions than whether the dies were found on the prisoner, and whether they had an apparent resemblance to the two sides of a sovereign.

The prisoner's counsel declined to address the jury. I left the case to them as I said I should, and they found the prisoner guilty.

If I ought to have ruled that the prisoner had, or left it to the jury to say if the prisoner had, lawful authority or excuse, the conviction is to be quashed. So if I ought to have left to the jury the question of whether he had a guilty intention in reference to the possession or use of these dies. So also if the indictment is bad.

G. BRAMWELL.

The stat. 24 & 25 Vict. c. 99 (Coinage Offences Act), s. 24, enacts that whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused) shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made, or impressed, or which will make or impress, or which shall be adapted and intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts of both, or either of such sides, &c., shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence.

*Dugdale*, for the prisoner.—The conviction cannot be sustained. First, as to the objection to the indictment. That is framed on the 24 & 25 Vict. c. 99, s. 24, which makes the possession of the die "without lawful authority or excuse" (the proof whereof shall lie on the party accused) a felony. The indictment only alleged possession without lawful excuse, it should also have alleged



without lawful authority, following the words of the statute. In Hawk. P. C. Bk. 2, c. 25, s. 110, it is said, "I take it for a general rule that unless the statute be recited neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion will make good an indictment which does not bring the fact prohibited or commanded in the doing or not doing whereof the offence consists within all the material words of the statute." See also sect. 113. In *Steel v. Smith* (1 B. & Ald. 94), the rule of pleading was laid down thus: "Where an Act of Parliament in the enacting clause creates an offence, and gives a penalty, and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration;" but in that case it was conceded that if there is the exception incorporated in the enacting clause, it must be negatived. This is in the nature of an exception and a material part of the enactment, and should have been negatived in the indictment. In the preceding statute (now repealed) on this subject (2 Will. 4, c. 34, s. 10), (a) the words "without lawful authority or excuse" were divided, and it was made an offence to make or mend any coining instrument or tool without authority, and another offence to have possession thereof without lawful excuse. This would have been a good indictment under that statute, and it may be that it was taken from the old form and not altered to meet the present statute. If it is said that the words "without lawful excuse" include without lawful authority, why does the statute use both phrases? The rule is to negative all the words of the statute. In *Leinbro and Hamper's case* (Cro. Eliz. 147), an indictment for

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(a) The 2 Will. 4, c. 34, s. 10, enacts that if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin, or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall without lawful excuse (the proof whereof shall lie on the party accused), have in his custody or possession any edger, edging tool, collar, instrument, or engine, adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures, apparently resembling those on the edges of any of the king's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin, or proceed to make or mend, or buy or sell, or shall without lawful excuse to be proved as aforesaid, have in his custody or possession any press for coinage, or any cutting engine, for cutting by force of a screw or any other contrivance round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used, for or in order to the counterfeiting any of the king's current gold or silver coin, every such offender shall, in England and Ireland, be guilty of a felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

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perjury was held bad which charged that the defendant *false et corruptive deposuit*, because it did not aver *voluntarie* also, although the indictment concluded *et sic voluntarium commissere perjurium*. See also *Anon.* (Cro. Eliz. 20), where there was a similar decision. So in *Reg. v. Davis* (1 Leach, 556) an indictment upon a statute which made it felony “wilfully and maliciously” to shoot at any person in a dwelling house or other place, was holden bad because it charged the offence to have been done “unlawfully and maliciously,” omitting the word “wilfully.” Some of the judges thought maliciously included wilfully in that case, but the majority held that as “wilfully and maliciously” were both mentioned in the statute as descriptive of the offence, both must be stated in the indictment. So an indictment upon the stat. 7 & 8 Geo. 4, c. 30, s. 2, for feloniously, voluntarily, and maliciously setting fire to a barn, was holden bad because the words of the statute are “unlawfully and maliciously:” (*Reg. v. Turner*, 1 Moo. C. C. 239). So an indictment upon stat. 9 Geo. 4, c. 31, s. 12, charging the prisoner with “feloniously, wilfully, and maliciously cutting,” &c., is not sufficient, the words of the statute being “unlawfully and maliciously”: (*Reg. v. Ryan*, 2 Moo. C. C. 15.) So here, the words of the statute being “without lawful authority or excuse,” the indictment is bad for alleging only that the offence was committed without lawful excuse. Authority and excuse are not synonymous. [BOVILL, C.J.—You may say in this very case, although there was some authority for the prisoner’s having the die, yet it cannot altogether be said that he had it in his possession with lawful excuse.] *Rex v. Bannon* (2 Moo. C. C. 309), cited for the prosecution at the trial, is inapplicable. The point there was whether the maker of the die or the prisoner who employed him to make it was a principal, and it was held that the maker, being an innocent agent, the prisoner was rightly convicted as a principal. As to the second point, there was evidence to go to the jury of the prisoner having the die in his possession without lawful authority or excuse. The evidence on this head not having been left to the jury, the conviction cannot be sustained. Thirdly, as to the evidence of guilty intent. The case states that there was evidence both ways on this point, and the jury ought to have had their opinion taken upon it. Every indictment for felony, whether created by statute or at common law, must allege that the accused committed the offence feloniously: (*Reg. v. Gray*, 9 Cox Crim. Cas. 417; L. & C. 365.) Evil intent is necessary to a felony: (Co. Lit. 391.) See also *Reg. v. Sleep* (8 Cox Crim. Cas. 472; 30 L. J. 170, M. C., Cockburn, C.J.), and *Rex v. Bannon* (Tindal, C.J., Hawk. P. C., Bk. 2, c. 25, s. 55.) In *Rex v. Ridgley* (1 East P. C. 172) the jury found something beyond mere possession of coining implements, viz., that the prisoner had possession knowingly, and for the purpose of coining.

*J. O. Carter* for the prosecution.—First, as to the form of the indictment. The statute puts the words “without lawful

authority or excuse (the proof whereof shall lie on the party accused)," as it were in a proviso, and the indictment need not mention them at all. *Rex v. Turner* (5 M. & S. 206) shows that it is sufficient in a conviction under stat. 5 Anne, c. 14, s. 2, against a carrier for having game in his possession, if the qualifications mentioned in 22 & 23 Car. 2, c. 25, s. 3, were negatived in the information and adjudication without negativing them in the evidence. Assuming that the indictment must allege the want of lawful authority or excuse, this indictment is sufficient, because the allegation without lawful excuse includes without lawful authority. There could be no better evidence of excuse than evidence of authority. Again, the words "without lawful authority or excuse" are divisible, and the words "without lawful excuse" belong appropriately to the part of the enactment relating to possession: (*Greville's case*, 1 Anderson, 195; *Elsworthy's case*, 2 East P. C. 986.) Secondly, there was no evidence of the prisoner's having lawful authority or excuse for the possession of the die. Thirdly, as to the felonious intent. No doubt there must be a felonious intent; but this is a statutable felony, and the felony consists in having possession of the die without lawful authority or excuse, and the purpose for which the prisoner intended to use the die is immaterial: (*Bell's case*, Foster C. C. 430.) The case of *Reg. v. Sleep* is an authority against the prisoner.

*Dugdale* was heard in reply.

BOVILL, C. J.—The first question is with respect to the sufficiency of the indictment. It appears to us that it is necessary to describe the same offence as that made by the statute, which is not simply having a die in possession, but having a die in possession without lawful authority or excuse (the proof whereof shall lie on the party accused). According to the ordinary rule, those words shift the burden of proof, but do not alter the character of the offence. The offence must be described in the indictment as before it became the practice to alter the burthen of proof in these cases. There is no authority to show that the introduction of the words "the proof whereof shall lie on the party accused" has altered the necessity of stating in the indictment the character of the offence. It being necessary, then, to aver in the indictment that the accused had the die in his possession without lawful authority or excuse, is this indictment sufficient which avers only that the accused had the die in his possession without lawful excuse, and does not aver that he had it without lawful authority? If the averment that the accused had it without lawful excuse necessarily includes that he had it without lawful authority, the indictment is good. It is true that the section uses both phrases, but if, as it was argued, it is sufficient to use the words "without lawful excuse" only, why were the words "without lawful authority" introduced? That is explained by referring to the previous statute (2 Will. 4, c. 34, s. 10), in which the two phrases were

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used to denote respectively different offences of a similar kind. When the new statute was framed all offences of this kind were subject to the same limitation, without lawful authority or lawful excuse. This may account for the introduction of the words into the existing statute. I have felt great difficulty in conceiving a case of an authority which would not be an excuse within the section. If, therefore, as it seems to us, the allegation that the accused had the die in his possession without lawful excuse must include that he had it without lawful authority, it follows that there is no necessity to aver in the indictment that he also had it without lawful authority. Therefore, we are of opinion that the indictment is good. Then the next question is whether there was evidence to be left to the jury of the prisoner having the die in his possession without lawful excuse. The only evidence stated in the case is that the Mint authorities gave directions to the maker of the die to go on making it, and that the police gave him permission to give it when made to the prisoner; and the prisoner desiring to have possession of the die obtained it from the maker. The authority, if any, was not that the prisoner might have the die in his possession, but only that he might carry out his original intent. There was no evidence, therefore, for the jury that there was any lawful authority or excuse for the prisoner having possession of the die. Another point was, that the intention of the prisoner in getting possession of the die ought to have been left to the jury. There is nothing in the enactment which makes the felonious intention of the accused a necessary part of the felony; it says only "without lawful authority or excuse." Under the word "feloniously" no doubt there must be a guilty knowledge of that which is made an offence by the Act of Parliament. It is admitted that there was on the part of the prisoner the knowledge of being in possession of the die without lawful authority or excuse. That being so, guilty intent is not an ingredient of the felony in this case, and ought not to have been left to the jury.

The rest of the COURT concurred.

*Conviction affirmed.*

Attorney for the prosecution, *The Solicitor to the Treasury.*  
Attorney for the defendant, *E. Parry, Birmingham.*

## WESTERN CIRCUIT.

## HAMPSHIRE SPRING ASSIZES.

*February 28, 1871.*

(Before Baron PIGOTT.)

REG. v. THOMAS STEPHENS AND ANN STEPHENS.(a)

*Trial—Defence by counsel—Prisoners themselves addressing the jury—Their counsel afterwards addressing the jury.*

*The prisoners, who were defended by counsel, were indicted for maliciously shooting at the prosecutor, and at the conclusion of the evidence for the prosecution, without waiting for their counsel, they themselves addressed the jury in their defence. When they had concluded their observations, the judge permitted their counsel then to address the jury in their behalf.*

THE two prisoners were indicted for unlawfully and maliciously shooting at and wounding Gilbert Broomfield, at Eling, on the 2nd of January, 1871.

*Compton* appeared for the prosecution.

*R. Bennett*, for the prisoners.

At the conclusion of the evidence on the part of the prosecution, the male prisoner immediately addressed the jury in his own defence, without waiting for his counsel; and, upon his concluding his remarks, the female prisoner did the same. When she had concluded,

*Bennett* applied to the learned Judge to know whether or not, under the circumstances, he might then be permitted to address the jury as counsel for the prisoners, observing that there were cases in which this had been sanctioned.(b)

PIGOTT, B.—Yes, you may address the jury for the prisoners. I think no harm or injustice is ever done by permitting prisoners to tell their own story. It is often a truthful statement.

*R. Bennett* then addressed the jury for the prisoners.

*Verdict—Thomas Stephens not guilty; Ann Stephens guilty of unlawfully wounding.*

(a) Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

(b) See *Reg. v. Malings* (8 C. & P. 242), *Reg. v. Walkling* (8 C. & P. 243), *Reg. v. Dyer* (1 Cox Crim. Cas. 113), and *Reg. v. Burrows* (1 Cox Crim. Cas. 363).

## MIDLAND CIRCUIT.

## DERBYSHIRE SPRING ASSIZES.

March 6, 1871.

(Before Baron CLEASBY.)

REG. v. HORTON. (a)

*Bigamy—Reasonable belief of the death of first wife—Absence for less than seven years.*

*It is a good defence to an indictment for bigamy that the prisoner at the time of the second marriage honestly and bonâ fide believed that his first wife was dead, and had reasonable grounds for so believing.*

**F**REDERICK HORTON was indicted for feloniously marrying one Lucy Swire, his former wife Letitia Phillips being still alive.

*Bradshaw* prosecuted.

*Weightman* defended the prisoner.

The prisoner married Letitia Phillips, on the 17th of February, 1863. She left him in 1864, and went to reside with a family in France. It appeared that the prisoner became acquainted with Lucy Swire, in 1865 or 1866, and that he made various inquiries about his wife Letitia, with a view to ascertaining where she was living, or whether she was still alive. He called upon her mother Mrs. Phillips, who said that all she knew of her daughter was that she had gone to France; and he afterwards went to Chester and other places, and made inquiries of a detective, but failed to obtain information. In November, 1866, he received a letter from Henry Phillips, his wife's brother, saying, "My sister went on to the Continent with a travelling family a long time ago; we expect she is drowned, for we have not heard from her since she went."

On the 13th of October, 1867, the prisoner married Lucy Swire, his wife Letitia being still alive.

*Weightman*, for the prisoner, contended, on the authority of *Reg. v. Turner* (9 Cox Crim. Cas. 145), that although seven years had not elapsed before the second marriage, yet, if the prisoner

(a) Reported by H. F. POOLEY, Esq., Barrister-at-Law.



at the time of the second marriage had an honest belief that his first wife was dead, he ought to be acquitted.

CLEASBY, B., in the course of his summing up, said—"It is submitted that, although seven years had not passed since the first marriage, yet if the prisoner reasonably believed (which pre-supposes proper grounds of belief) that his first wife was dead, he is entitled to an acquittal. It would press very hard upon a prisoner if under such circumstances he could be convicted, when it appeared to him as a positive fact that his first wife was dead. The case which was cited of *Reg. v. Turner* shows that this was the view of Baron Martin, a judge of as great experience as any on the bench now, and I am not disposed to act contrary to his opinion. You must find the prisoner guilty, unless you think that he had fair and reasonable grounds for believing, and did honestly believe, that his first wife was dead."

The jury returned a verdict of guilty, and the learned Judge sentenced the prisoner to imprisonment for three days, remarking that he was quite satisfied with the verdict, and that he should inflict a light sentence, as he thought the prisoner really believed his first wife was dead, although he was not warranted in holding that belief.

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v.  
HORTON.  
—  
1871.  
—  
*Bigamy.*

## MIDLAND CIRCUIT.

## DERBYSHIRE SPRING ASSIZES.

(Before Baron CLEASBY.)

March 7, 1871.

REG. v. GOODEN.(a)

*Forgery—Railway ticket—Receipt or acquittance.*

*An ordinary railway ticket is not an acquittance or receipt for money within the Forgery Act (24 & 25 Vict. c. 98, s. 23).*

THERE were several indictments against the prisoner for forging tickets of the Midland Railway Company, the Manchester, Sheffield, and Lincolnshire Railway Company, and the Great Northern Railway Company. One set of indictments charged the offences as forgeries under the 24 & 25 Vict. c. 98, s. 23, the railway tickets being described as “acquittances,” “receipts,” or “receipts and acquittances;” while another set of indictments charged the offences as common-law misdemeanors.

*Mellor, Dugdale, and Sturge* prosecuted.

*Digby Seymour, Q.C., and Lawrence* defended the prisoner.

The first indictment was for forging a ticket of the Midland Railway Company, and charged the offence as a forgery under the statute.

*Mellor* submitted that a railway ticket is a “receipt for money” within the meaning of the statute. If, in the usual course of business, railway tickets are treated both by companies and passengers as receipts, it is immaterial that they do not on the face of them purport to be receipts. He could prove that they were never given to a passenger by the Midland Railway Company until he had paid his fare. If a man was allowed to travel without paying his fare, he had a “pass” given to him. He cited *R. v. Kay* (L. Rep. 1 C. C. R. 257), and *R. v. French* (39 L. J. 50, M. C.)

CLEASBY, B.—A railway ticket is evidence that the holder of it has made a bargain with the railway company that he shall travel on their line between the places named on the ticket. It is a certificate showing that he has a right to travel. I entertain no

(a) Reported by H. F. POOLEY, Esq., Barrister-at-Law.

doubt that it is not an "acquittance or receipt" within the meaning of the statute. If every ticket for which more than forty shillings had been paid were liable to stamp duty as a receipt for money, railway companies would have made themselves liable to very heavy penalties.

A verdict of acquittal was accordingly taken on this indictment.

The second indictment, which was preferred by the Great Northern Railway Company, was in the same form.

*Dugdale* and *Sturge*, for the prosecution, pressed the same point upon his Lordship, and cited farther *R. v. Pulbrook* (9 Car. & P. 37), and *R. v. Raake* (2 Moo. C. C. 66; 8 Car. & P. 627); and submitted that it was a question for the jury whether the railway ticket was treated in the ordinary course of business as a receipt.

His LORDSHIP said that his opinion remained unaltered; and a verdict of acquittal was taken.

The prisoner pleaded guilty to the indictment charging him with common law misdemeanor, and was sentenced to two years' imprisonment.

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v.  
DUNNING.  
—  
1871.

Forgery—  
Railway ticket

## HOME CIRCUIT.

KENT SPRING ASSIZES, 1871.

*Maidstone, March 14.*

(Before Mr. Justice HANNEN.)

REG. v. SELTEN. (a)

*Murder—Implied malice—Provocation—Receiving a blow.*

*If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and, on such renewal, uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder.*

*But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other, having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter.*

**T**HE prisoner was indicted for wilful murder.

*Biron and E. Stanhope for the prosecution.*

*Ribton and Ballantine for the prisoner.*

The prisoner and the deceased, who were strangers, met at a public-house, with others, and sat there drinking and wrangling until midnight, when they were all turned out. In consequence of some trivial quarrel about a game, the deceased struck the prisoner a blow on the face with his open hand, saying, "that if he did not like it he might return it." The prisoner said he was not in a fit state to fight, and the men stood wrangling for some interval of time which was described by most of the witnesses as "about ten minutes." Then the two men shook hands and parted, the prisoner going towards home. When he had gone about thirty yards, he stopped, turned round, and cried out, "Now I am on the highway; if anybody wants anything, I'm ready for him!" The deceased appeared to have taken this as a kind of challenge to himself, and at all events accepted it as such, and went after the prisoner, who had stood still. Almost immediately afterwards the deceased was heard to cry out, "I am stabbed;"

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

and was found lying on the ground, his jacket off and in the hands of the prisoner, who was standing by, and a mortal wound in his abdomen which, there was no doubt, was inflicted by the prisoner, who said, "I shouldn't have done it if he hadn't hit me on the face." When the dying deposition of deceased was taken, he declared that, on the second occasion, he had not struck the prisoner; and when the prisoner said to him, "Didn't you knock me down?" the dying man denied it.

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SELTEN.  
—  
1871.  
—

Murder—  
Provocation—  
Manslaughter

*Biron*, for the prosecution, cited *Rex v. Snow* (1 Leach C. C.)

*Ribton*, for the prisoner, cited *Reg. v. Lynch* (5 Car. & P. 324.)

HANNEN, J., to the jury.—There can be no question that the death of the deceased was caused by the hand of the prisoner, and therefore the sole question is as to the character of the prisoner's act. Now murder is killing with malice aforethought; but, though the malice may be harboured for a long time for the gratification of a cherished revenge, it may, on the other hand, be generated in a man's mind, according to the character of that mind, in a short space of time, and, therefore, it becomes the duty of the jury in each case to distinguish whether such motive had arisen in the mind of the prisoner, and whether it was for the gratification of such malice he committed the fatal act. But the law, having regard to the infirmity of man's nature, admits evidence of such provocation as is calculated to throw a man's mind off its balance, so as to show that he committed the act while under the influence of temporary excitement, and thus to negative the malice which is of the essence of the crime of murder. It must not be a light provocation; it must be a grave provocation; and undoubtedly a blow is regarded by the law as such a grave provocation; and, supposing a deadly stroke inflicted promptly upon such provocation, a jury would be justified in regarding the crime as reduced to manslaughter. But if such a period of time has elapsed as would be sufficient to enable the mind to recover its balance, and it appears that the fatal blow has been struck in the pursuit of revenge, then the crime will be murder. In the present instance, the evidence as to the time which had elapsed is left in some uncertainty; but several witnesses say it was "about ten minutes." It is for you to form your own conclusions as to what took place in the interval, as to which you can only draw inferences from the circumstances. And, though there is no express evidence of a renewal of the aggression on the part of the deceased (and the evidence is rather against the supposition, especially as the prisoner did not accuse him of it at the time), it is beyond a doubt that he followed the prisoner with the intention of renewing the attack, and his jacket was found off. It is for you to draw such inferences from this as you think warranted by the evidence. If you come to the conclusion that the prisoner, after the blow had been given, had time for his blood to cool, and that when he stopped on the road he had the intention in his mind to use the knife in the event of the deceased following him, and uttered the

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Manslaughter.

words he used with the object of inducing the deceased to follow him, there would be evidence of implied malice to sustain the charge of murder. But if you come to the conclusion that the prisoner had *not* such intention in his mind, and that he did not utter the words with such intention, that they were idle words of bravado, not of challenge, and that he used the knife on some fresh and sudden provocation ensuing from the deceased following him and renewing the assault upon him, then there is evidence to reduce the crime to manslaughter.

*Verdict—Manslaughter ; sentence—fifteen years' penal servitude.*

## CENTRAL CRIMINAL COURT.

*July 15, 16, 17 and 18, 1870.*

(Before Lord Chief Justice COCKBURN.)

REG. v. DAVITT AND ANOTHER.(a)

*The Treason Felony Act (11 & 12 Vict. c. 12)—Overt acts—Supplying arms to be used in insurrection—Evidence—Jurisdiction.*

*Under the Treason Felony Act (11 & 12 Vict. c. 12), sending or supplying arms to be used in aid of a treasonable confederacy, having for its object the overthrow of the Queen's Government, in any part of the United Kingdom, by force of arms, is a sufficient overt act of a conspiracy to depose or deprive the Queen. And it is not the less so because the arms are sold, and the motive of the sale is pecuniary profit, provided it is known that they are to be used in aid of insurrection. Secret storing of arms and sending them, under feigned addresses, into districts where the confederacy exists, with various contrivances to conceal their ultimate destination, and with knowledge of the confederacy, is evidence of the offence. And bringing arms to London, with a view to their transmission for such purpose :*

*Held, a sufficient overt act within the jurisdiction of the Central Criminal Court.*

**I**NDICTMENT under the Treason Felony Act.(b) The prisoners, Davitt and Wilson, were indicted for that on the 1st of December, 1865, and on divers days before and after,

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

(b) 11 & 12 Vict. c. 12, the "Act for the better securing the Crown and Govern-



they, together with others unknown, did feloniously compass and devise to deprive and depose the Queen from her style and title of the Imperial Crown of the United Kingdom of Great Britain and Ireland; and the said prisoners did utter, express, and declare, by divers overt acts and deeds mentioned, that is to say: (1) In order to fulfil their felonious purpose, they feloniously did (a) conspire to levy war, insurrection, and rebellion against the Queen within the realm; (2) they did feloniously conspire to subvert the constitution; (3) to incite foreigners, to wit, citizens of the United States of America and persons resident in America, to invade Ireland; (4) to become members of a certain society known as the Fenian Brotherhood, having for its object and design the overthrow of the Queen's authority in Ireland, and to induce others to be members; (5) to prepare means whereby the authority of the Queen in Ireland might be overthrown; (6) to procure and provide large quantities of arms and ammunition with intent to arm themselves and other evil disposed persons, to raise, make, and levy insurrection and war against the Queen, within the realm; (7) they did feloniously make and provide large quantities of arms with such intent; (8) did become members of the Fenian Brotherhood, having for its object the establishment of a republic in Ireland; (9) did become members of an unlawful association, the members of which were required to take an unlawful oath purporting to bind the persons taking it by force and arms to make Ireland a republic; (10) they—well knowing that an unlawful association existed in Ireland of persons known as Fenians, having for their object the overthrow of the Queen's authority in Ireland and the establishment of a republic there—did feloniously, by causing to be conveyed arms and ammunition into Ireland, endeavour to aid and assist the said association, and to advance the object thereof; (11) they did feloniously and unlawfully conspire together to incite and urge divers subjects of the Queen to join and become members of the Fenian association having for its object the overthrow of the Queen's power in Ireland, &c.; (12) they feloniously entered into a treasonable conspiracy, and became and were members of the Fenian Brotherhood, having for its object, &c., and as such members did collect arms, and distribute sums of money, and make journeys, and give orders and directions to divers persons, and did mutually aid and assist each other, with the object and intent of advancing and effecting the felonious object; (13) they did conspire in raising insurrection in Ireland and levying war

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ment of the United Kingdom," s. 3: "That if any person shall compass or devise to deprive or depose the Queen from the style or royal name of the Imperial Crown of the United Kingdom, or to levy war against her, in order by force or constraint to compel her to change her counsels or measures; or to move or stir any foreigner or stranger with force to invade the United Kingdom, and such devices or intentions shall declare or express by any publication, or by any *overt act or deed*, he shall be guilty of felony."

(a) No venue was laid for the conspiracy or any of the overt acts, except such as is expressly stated in any of them, nor was there any allegation "within the jurisdiction."

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there; (14) they did feloniously conspire and consult with divers persons in and about raising insurrection in Ireland and levying war against the Queen; (15) they conspired with such persons to levy war against the Queen; (16) to subvert the constitution and government of the realm; (17) to seize arms at Chester; (18) they, with others, did at divers places in Ireland meet together armed to fight the peace-officers of the Queen, and did thereby levy war against her; (19) they did aid and assist the Fenian Brotherhood in making war against the Queen; (20) they did come into *Paddington in the county of Middlesex*,<sup>(a)</sup> and did make divers other journeys in order to aid in forwarding to Ireland arms and ammunition, for the purpose of fighting against the Queen's troops and peace-officers, and for the overthrow of her power and authority in Ireland; (21) did conspire to cause to be sent large quantities of arms to Ireland with the object of their being used in Ireland in feloniously making war against the Queen; (22) did conspire to cause to be sent to Leeds quantities of arms and ammunition, with the object that they should be sent to Ireland and used there in feloniously making war against the Queen and fighting against her troops and peace-officers; (23 to 25) similar, laying different places; (26) they did conspire to send to *Paddington, in the county of Middlesex*,<sup>(b)</sup> quantities of arms and ammunition, with the intent that they should be sent to Ireland, to be used in making war against the Queen, &c.; (27) they did cause to be brought to *Paddington*,<sup>(c)</sup> *in the county of Middlesex, and within the jurisdiction of the Central Criminal Court; and there did have* large quantities of arms with the intent and object that they should be used in levying war, insurrection, and rebellion against the Queen; (28) they did conspire that, with the intent of aiding such object, such arms should be brought into *Paddington, &c.*, and the said Wilson did bring the said arms into *Paddington, within the jurisdiction, &c.*; (29, 30) similar; (31) did conspire to meet together at *Paddington* within the jurisdiction, for the purpose of aiding and advancing the said object; (32) they did for that purpose there meet together; (33) they did for that purpose go to the Great Western Railway Station at *Paddington, within the jurisdiction, against the peace of the Queen, against her crown and dignity, and contrary to the statute.*

*Second Count.*—That the prisoners did with divers others feloniously conspire to levy war against the Queen in Ireland, in order by force to compel her to change her measures and councils; and the said felonious purpose did utter and declare by divers overt acts (laying overt acts similar to those in the former count), against the peace of the Queen, and her crown and dignity, and contrary to the statute.

(a) Not laid to be, but being within the jurisdiction of the court.

(b) *Vide ante.*

(c) *Vide supra.* These were the more material parts on which the case really proceeded.

Sir R. Collier, A.G., Sir J. Coleridge, S.G., H. T. Cole, Q.C., Archibald, and Poland, for the Crown.

*Collins* for the prisoner Wilson.

*Griffiths* and *Moody* for the prisoner Davitt.

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Evidence was given as to the existence and action of the illegal association alluded to in the indictment under the name of the "Fenian Brotherhood." The evidence was chiefly that of an informer, who stated that the object of it was to overthrow the Queen's government in Ireland, and to establish a republic. Oaths were administered to the members to take up arms when required for this object, and measures were taken to procure arms for the purpose. In February, 1861, an attempt was actually made to take Chester Castle. He stated that he had seen the prisoner Davitt about that time at meetings of the brotherhood, and had seen him there when the intended rising was discussed.

It was also proved that the prisoner Davitt had been seen in the company of persons afterwards convicted as members of the treasonable brotherhood referred to, and that he had been seen at places frequented by American officers. Evidence was given that the meeting of the brotherhood had continued to the present time. Evidence was given of attacks by insurgents upon the military and police in Ireland during the year 1867. And there was evidence that the organisation still continued.

With regard to the complicity of the prisoners, the substance of the evidence was as follows :—It was proved that the prisoner Davitt, in October and November last, was residing in London under the name of Jackson. In December last, on the occasion of the arrest of a man suspected to be a Fenian, and convicted of illegally possessing arms, he tried to destroy a letter which was seized by the police and proved to be in the handwriting of the prisoner Davitt. It was dated from Glasgow, but had no signature, and contained the passage: "As to the other affair, I hope you will not take any other part in it; you are of too much importance to your family to be spared, even at the risk of allowing a rotten sheep to exist among the flock. All care and trouble of the last twelve months will have been in vain. Whoever may be employed to do it, let him not use the pen we have been selling, but get another for the purpose."

It was, in effect, admitted by a witness called for the defence, that the terms "flock" and "family" meant the Fenian brotherhood; that "rotten sheep" meant a traitor to it; that "pen" meant a fire-arm. Another witness admitted buying revolvers from a man named Monaghan, the partner of the prisoner Wilson, and selling them to various persons.

In January last the prisoner Davitt took a warehouse at Leeds, under the name of Jackson. He had a warehouseman named Anderson. The other prisoner, Wilson, was a gun-maker at Birmingham, in partnership with Monaghan. Arms made by him were from time to time taken to the house of a poor man, an Irishman, who had no demand for them, and to whose house they

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were evidently carried for the purpose of secret conveyance. On several occasions the prisoner Wilson was seen to fetch away parcels of arms thus disposed of.

On the 26th of March, when the police had their attention directed to the matter, a box was found at the railway-station addressed to Wilson himself, at Leeds. The box, being opened, was found to contain arms. Wilson went to Leeds, and there, with Anderson, the other prisoner's foreman, went to the station to fetch away the box of arms thus addressed to him; and they carried it to the warehouse of the other prisoner, Davitt. Next day Davitt and his men went to the warehouse, and took away two casks, which were found to be heavy, and carried them to the station of the London and North-Western Railway Company, addressed to some person in Ireland, at a place where no such person was found to exist. Several other consignments of arms were traced under similar circumstances. Between the 26th of March, when the attention of the police was first directed to the matter, and the 14th of May, when the prisoners were arrested at the Great Western Railway Station in Paddington, there were fifteen such consignments of arms—eight to Ireland, and six to Glasgow and other places; all sent with false and fictitious addresses, and all the addresses in the handwriting of the prisoner Davitt, and all the consignments coming originally from the workshop of the prisoner Wilson.

On the 14th of May Davitt came to London under the name of Mathews, and on that day Wilson was seen at the station at Birmingham with two parcels, which turned out to contain fifty revolvers; and at the other station at Paddington, when he arrived, the other prisoner, Davitt, was found loitering about the station, and said he was waiting for a friend. On their being arrested, his address, under the name of Mathews, was found in the pocket of the other prisoner, Wilson; and the sum of 150*l.* was found on the person of Davitt.

Such was the substance of the case against the prisoners.

*Collins*, for the prisoner Wilson, urged that it was not proved that he had any connection with the Fenian conspiracy, and that it was consistent with all the evidence that he was ignorant of it, and merely sold weapons to the other prisoner in the way of business, with no idea of their destination.

*Griffiths*, for the other prisoner, Davitt, urged that there was no sufficient proof that he was connected with the conspiracy, as the only evidence of it was that of the informer, not confirmed; and that it was consistent with the evidence that the object of the consignments was innocent.

On the part of the prisoners witnesses were called, one of whom, however, proved that the letter was in the handwriting of the prisoner Davitt, and gave it an interpretation applying to the Fenian conspiracy. He, however, attempted an explanation of it by suggesting that it was a copy of a letter sent to Davitt, and by him sent to the witness.

Sir *R. Collier*, A.G., relied strongly on the letter as proof of the complicity of Davitt, but urged that these numerous secret consignments of arms—especially to Ireland—all emanating from the shop of the prisoner Wilson, and conducted by the other prisoner, were proofs of the complicity of both of them.

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COCKBURN, C.J., to the Attorney-General. — Supposing the prisoner Wilson had had nothing to do with Fenian designs, but was willing to supply men whom he knew to be Fenians with arms, although indifferent to the purposes for which they might be used, was it contended that he had conspired in the felony? In such a case he would sell them with a knowledge of his customers, but without any intention of his own to aid in their design. Would he be liable to be charged with complicity in the felony?

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Sir *R. Collier*, A.G., said he apprehended that if the prisoner knew the illegal purpose for which the arms were to be used, without any further complicity on his part than the mere sale, he would be guilty of felony. An accessory before the fact to a felony had been held to be a principal. In this case the prisoner had done more than sell the arms—he had gone to Leeds to co-operate with Davitt in using them.

COCKBURN, C.J.—It may be so. (a)

Afterwards, at the close of the case,

COCKBURN, C.J., to the jury.—The prisoners are indicted for what is in substance high treason, though that is not the crime for which they are indicted, as, under the statute, what would before have been high treason is now created an offence for which, upon conviction, a lesser punishment than that of treason is to be inflicted. The substance of the charge against the prisoners contained in this voluminous indictment may thus be stated: A conspiracy to depose the Queen (a charge which would be proved by showing an attempt to depose her from her State as sovereign in any part of her dominions—as Ireland), and with that object to levy war against her. And the overt acts relied upon in support of the conspiracy are the procuring and producing arms for the purpose of being used in the intended insurrection against the royal authority in Ireland. You will have to consider, first, whether arms were provided in this country for the purpose of being sent to Ireland with the intention of being used and employed in rebellion there; next, whether they were sent by the prisoners, or either of them, with the intention of their being so used and employed. We have the fact of the letter, proved to be in the handwriting of the prisoner Davitt, and proved by a witness for the defence to refer to the Fenian conspiracy, and to traitors to it, and to the use of weapons against such traitors. We have the fact of large and repeated consignments of arms by the defendants to false addresses and fictitious persons in

(a) It will be seen that the Lord Chief Justice, after consideration—the case occupying several days, and there being an adjournment after it was concluded before the summing-up—directed the jury in accordance with this view of the case.



Ireland and other parts of the country, these arms coming from  
 the workshop of one prisoner—Wilson—and secretly consigned to  
 the addresses in the handwriting of the other prisoner, Davitt.  
 And the question naturally arises for what purpose were all these  
 consignments; and why were they thus made? not openly, but  
 secretly; and by means of such devices and contrivances. The  
 fact that strikes the mind most forcibly is, that in all these cases  
 there was concealment and contrivance, which must have been for  
 some purpose. It is for you to exercise your own judgment as  
 to whether it was an innocent purpose. In these consignments  
 both prisoners take part, and finally one of them (Wilson)  
 comes to London, evidently to meet the other, with his address,  
 under a feigned name, in his pocket, and with fifty revolvers;  
 and there, at Paddington, the other prisoner (Davitt) actually is  
 to meet him. As regards the prisoner Davitt, there is positive  
 evidence (that of the informer) that he was engaged in the Fenian  
 conspiracy. Whether the evidence is credible and reliable, and  
 how far it is confirmed, it is for you to judge. There is the letter,  
 which in terms appears to point to this conspiracy and as to  
 which you have heard the explanation, which it is for you to  
 judge of. If you are not satisfied, then from the terms of that  
 letter you may infer the complicity of Davitt. But that is not  
 the whole evidence; and even if you are not satisfied as to the  
 evidence of the informer, and were satisfied with the explanation  
 as to the letter, there would yet remain other evidence in the case  
 fit for you to consider. There is the internal evidence afforded  
 by the nature of the acts themselves, laid as overt acts of the  
 alleged conspiracy. When you find men sending arms to a  
 country in which disaffection and disloyalty exist—doing it  
 secretly and by clandestine means, and under circumstances cal-  
 culated to excite extreme suspicion and distrust—in the absence  
 of any explanations of such conduct, it will not be difficult to draw  
 your own inferences as to the purpose and motive of such conduct.  
 No doubt it is for the Crown to make out their case; but it is  
 often impossible to give direct evidence of a man's motives or  
 intentions in a particular matter, and a jury must often look at  
 the act itself, and judge from the nature of the act as to the  
 character of the motive; and when you find these clandestine  
 consignments of arms to Ireland, the country where this  
 treasonable conspiracy existed, and where it was to be attempted  
 to effect its object, it is for you to form your own judgment as  
 to the *purpose* of these consignments. And if you are satisfied,  
 either from the letter or from the other facts proved, that the  
 purpose in sending these arms was the furtherance of the Fenian  
 conspiracy, and that the arms were intended to be used in  
 subverting the Queen's authority in that country: then although  
 you may not be satisfied that the prisoner was at any of the  
 Fenian meetings, you may draw your own inferences from the  
 other facts. Considering the character of the arms, as well as  
 the circumstance under which they were sent, arms in a rough



and unfinished state, not fitted for sale though just as well capable of being used, and bearing in mind the absence of any attempt at an explanation of these things, it is for you to judge what is the natural inference to be drawn. And if you believe that the prisoners sent these arms in order that they might be used in levying war against the Queen, then the case is established against them. These remarks on the evidence in the case have applied more particularly to the prisoner Davitt, who directed the transmission of the arms. With regard to the other prisoner, Wilson, there can be no doubt the arms were made by him; and if he did no more than make and supply them, and merely shut his eyes to their destination, that is not sufficient to convict him. But if you believe that, in supplying the arms, he had a knowledge that they were about to be used for a traitorous purpose, and with the intention that they should be so used, then he is involved with the other prisoner in a common guilt. If he was indeed ignorant of their destination, then it would be otherwise; of this you must form your own judgment. And if he, knowing the object, though himself not caring about it, yet, for the sake of sordid gain, lent himself to that object, he would be guilty. The great question is, whether the arms were sent with the traitorous purpose of exciting insurrection. If you are satisfied that they were sent for that purpose, then, if both the prisoners knew of it, both are guilty; or, if not, then such one of them as knew of it. It is necessary that an overt act should have been committed within the jurisdiction of this court, and if you are satisfied that the arms were brought by the prisoner Wilson to the Paddington station in pursuance of the traitorous object, then there would be such an act within the jurisdiction. Nothing has been proved to account for the arms being so brought. If you are satisfied that they were brought to be used for the traitorous purpose, and that one prisoner was bringing them in concert with the other for that purpose, then they would be both guilty upon this indictment, for there would be an overt act by both of them in furtherance of a common traitorous design. Consider, then, whether the prisoners, or either of them, sent these arms, and sent them secretly and clandestinely, for the purpose of aiding the treasonable conspiracy.

REG.  
v.  
DAVITT.

1870.

Treason Felony  
Act —  
Supplying arms  
—Evidence.

*Verdict against both prisoners—Guilty.(a)*

(a) Davitt was sentenced to fifteen years' penal servitude, and Wilson to seven.

REG.  
v  
DAVITT.

1870.

Treason Felony  
Act—  
Supplying arms  
—Evidence.

Ireland and other parts of the country, these arms coming from the workshop of one prisoner—Wilson—and secretly consigned to false addresses in the handwriting of the other prisoner, Davitt.

And the question naturally arises for what purpose were all these consignments; and why were they thus made? not openly, but secretly; and by means of such devices and contrivances. The fact that strikes the mind most forcibly is, that in all these cases there was concealment and contrivance, which must have been for some purpose. It is for you to exercise your own judgment as to whether it was an innocent purpose. In these consignments both prisoners take part, and finally one of them (Wilson) comes to London, evidently to meet the other, with his address, under a feigned name, in his pocket, and with fifty revolvers; and there, at Paddington, the other prisoner (Davitt) actually is to meet him. As regards the prisoner Davitt, there is positive evidence (that of the informer) that he was engaged in the Fenian conspiracy. Whether the evidence is credible and reliable, and how far it is confirmed, it is for you to judge. There is the letter, which in terms appears to point to this conspiracy and as to which you have heard the explanation, which it is for you to judge of. If you are not satisfied, then from the terms of that letter you may infer the complicity of Davitt. But that is not the whole evidence; and even if you are not satisfied as to the evidence of the informer, and were satisfied with the explanation as to the letter, there would yet remain other evidence in the case fit for you to consider. There is the internal evidence afforded by the nature of the acts themselves, laid as overt acts of the alleged conspiracy. When you find men sending arms to a country in which disaffection and disloyalty exist—doing it secretly and by clandestine means, and under circumstances calculated to excite extreme suspicion and distrust—in the absence of any explanations of such conduct, it will not be difficult to draw your own inferences as to the purpose and motive of such conduct. No doubt it is for the Crown to make out their case; but it is often impossible to give direct evidence of a man's motives or intentions in a particular matter, and a jury must often look at the act itself, and judge from the nature of the act as to the character of the motive; and when you find these clandestine consignments of arms to Ireland, the country where this treasonable conspiracy existed, and where it was to be attempted to effect its object, it is for you to form your own judgment as to the *purpose* of these consignments. And if you are satisfied, either from the letter or from the other facts proved, that the purpose in sending these arms was the furtherance of the Fenian conspiracy, and that the arms were intended to be used in subverting the Queen's authority in that country: then although you may not be satisfied that the prisoner was at any of the Fenian meetings, you may draw your own inferences from the other facts. Considering the character of the arms, as well as the circumstance under which they were sent, arms in a rough

and unfinished state, not fitted for sale though just as well capable of being used, and bearing in mind the absence of any attempt at an explanation of these things, it is for you to judge what is the natural inference to be drawn. And if you believe that the prisoners sent these arms in order that they might be used in levying war against the Queen, then the case is established against them. These remarks on the evidence in the case have applied more particularly to the prisoner Davitt, who directed the transmission of the arms. With regard to the other prisoner, Wilson, there can be no doubt the arms were made by him; and if he did no more than make and supply them, and merely shut his eyes to their destination, that is not sufficient to convict him. But if you believe that, in supplying the arms, he had a knowledge that they were about to be used for a traitorous purpose, and with the intention that they should be so used, then he is involved with the other prisoner in a common guilt. If he was indeed ignorant of their destination, then it would be otherwise; of this you must form your own judgment. And if he, knowing the object, though himself not caring about it, yet, for the sake of sordid gain, lent himself to that object, he would be guilty. The great question is, whether the arms were sent with the traitorous purpose of exciting insurrection. If you are satisfied that they were sent for that purpose, then, if both the prisoners knew of it, both are guilty; or, if not, then such one of them as knew of it. It is necessary that an overt act should have been committed within the jurisdiction of this court, and if you are satisfied that the arms were brought by the prisoner Wilson to the Paddington station in pursuance of the traitorous object, then there would be such an act within the jurisdiction. Nothing has been proved to account for the arms being so brought. If you are satisfied that they were brought to be used for the traitorous purpose, and that one prisoner was bringing them in concert with the other for that purpose, then they would be both guilty upon this indictment, for there would be an overt act by both of them in furtherance of a common traitorous design. Consider, then, whether the prisoners, or either of them, sent these arms, and sent them secretly and clandestinely, for the purpose of aiding the treasonable conspiracy.

REG.  
v.  
DAVITT.  
—  
1870.

Treason Felony  
Act —  
Supplying arms  
—Evidence.

*Verdict against both prisoners—Guilty.(a)*

(a) Davitt was sentenced to fifteen years' penal servitude, and Wilson to seven.

## OXFORD CIRCUIT.

STAFFORD SPRING ASSIZES, 1871.

March 16th.

(Before Mr. Justice MONTAGUE SMITH.)

REG. v. MARY ANN WILLIAMS. (a)

*Concealment of birth—Identification of body of child.*

*In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found, and identified as that of the child of which she is alleged to have been delivered.*

*A woman, apparently pregnant, while staying at an inn at Stafford, received by post, on the 28th of August, 1870, a Rugby newspaper, with the Rugby postmark upon it. On the same day her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting-room at Stafford station. It was the dead body of a newly-born child, wrapped in a Rugby Gazette of August 27th, 1870, bearing the Rugby postmark. There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at Stafford Station :*

*Held that this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, and would not, therefore, justify her conviction for concealment of birth.*

**T**HE prisoner was indicted for unlawfully concealing the birth of her female child on the 29th of August, 1870.

*Harrington and Fulford for the prosecution.*

*Motteram and Young for the defence.*

On the 25th of August the prisoner engaged a bedroom and private sitting-room at the Eagle Inn, Stafford. She appeared to be then in an advanced state of pregnancy. On the 28th of August she received a letter and a newspaper, each bearing the Rugby postmark. A witness proved the posting of these to the prisoner from Rugby at the end of August. The newspaper was one of two published at Rugby. That morning the landlady,

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

visiting her, found her pale, ill, and diminished in size, and observed stains upon the carpet, which had been washed by the prisoner, who had also emptied the chamber vessel herself. In answer to the questions of the landlady, the prisoner denied that she had been delivered, and accounted for the appearances by saying that she was subject to menstrual disorders. An after-birth was found in the watercloset of the inn. The prisoner left the "Eagle" on the 29th of August, at ten a.m., for Shrewsbury. She carried a parcel with her under her cloak. In the afternoon of the same day a parcel was found in the closet of the ladies' waiting-room at Stafford Railway Station. It was the dead body of a newly-born female child, wrapped in a *Rugby Gazette* of Saturday, August 27th, and parts of the *Daily Telegraph* of June 2, 1870. Proof of the facts above stated having been given, his LORDSHIP inquired whether it was proposed to offer any further evidence to identify the body of the child, saying, "The body is found in this closet at Stafford station, to which a great number of persons have access. The prisoner is not shown to have been there; and the only evidence is that the dead child was wrapped in a *Rugby Gazette*, which had gone through the Rugby post-office on a certain date. But all the newspapers sent from Rugby on that day would bear the same postmark. It is quite consistent with the evidence adduced that some one other than the prisoner might have wrapped up a body and left it in the waiting-room."

*Harington* intimated that he was unable to give further proof of the identification of the child.

MONTAGUE SMITH, J., to the jury.—It is impossible to proceed with this case. The gist of the offence charged in the indictment is the concealment, by the prisoner, of the dead body of her child. The evidence as to the identification of the body does not seem to me sufficient. A man cannot be convicted of murder unless the corpse of the murdered person is found, otherwise the prisoner charged might be executed, and the individual supposed to have been killed by him proved to be in fact living. So in the present case, the child of which the prisoner is said to have been delivered may, at this moment, be somewhere alive. I must direct you to return a verdict of not guilty.

*Verdict accordingly.*

REG.  
v.  
WILLIAMS.  
—  
1871.  
—

*Concealment of  
Birth—  
Evidence.*

## OXFORD CIRCUIT.

STAFFORD SPRING ASSIZES, 1871.

March 17th.

(Before Mr. Justice MONTAGUE SMITH.)

REG. v. EMMA BATE, FANNY BAILEY, AND ELIZA ANSLOW.(a)

*Evidence—Confession—Inducement—Concealment of birth.*

*A., being questioned by a police constable about the concealment of a birth, gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie."*

*Held, that a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free and voluntary.*

*A. was taken into custody the same day, placed with two accomplices, B. and C., and charged with concealment of birth. All three then made statements.*

*Held, that those made by B. and C. could not be deemed to be affected by the previous inducement to A., and were, therefore, admissible against B. and C. respectively, although that made by A. was not so.*

*The prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say. Whereupon A. made a statement which was taken down in writing, as usual, and attached to the depositions:*

*Held, that this latter statement of A. might be read at the trial as evidence against herself.*

*Mere proof that a woman was delivered of a child and allowed two others to take away its body:*

*Held, insufficient to sustain an indictment against her for concealment of birth.*

**I**NDICTMENT alleged that Emma Bate was delivered of a female child on the 15th of September, 1870, at the parish of Cannock, and that the said Emma Bate and Fanny Bailey and Eliza Anslow afterwards, to wit, on the same day, unlawfully and secretly did cast and throw the dead body of the said child down

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.



and into a certain pit shaft there, and did thereby then and there unlawfully and secretly dispose of the dead body of the said female child, and endeavour to conceal the birth thereof.

*Warren* for the prosecution.

*A. Young* for the prisoners *Bate* and *Anslow*.

A policeman, called as a witness on behalf of the prosecution, said: "I went to the house of the prisoner *Bailey*. I said I wished her to tell me about the child that had been made away with. She said 'It's all nonsense, the people want hanging that set the report about, it was only a four months' child—we burnt the child and threw it into *Hednesford Pool*.' I said, 'it might be better for you to tell the truth and not a lie.'"

*Young* here objected that any statement by *Bailey* after the constable had so spoken to her could not be admissible in evidence, as it would not have been freely and voluntarily made: (*Archbold's Pleading and Evidence in Criminal Cases*, 16th edit. p. 208). *Reg. v. Kingston* (4 C. & P. 387) resembled the present case, the words which were therein held to exclude any subsequent statement being "You had better tell all you know."

*Warren, contra*, cited *Reg. v. Jarvis* (L. Rep. 1 C. C. R. 96; 37 L. J. N. S. 1, M. C.), for the judgment of *Kelly, C.B.*; but admitted that the judgment of *Willes, J.*, was rather adverse to him.

*MONTAGUE SMITH, J.*—I think, on referring to the numerous cases, that the weight of authority is against you, and that the further statement of the woman cannot be received.

The witness continued: "I afterwards went to *Wimblebury*, near *Hednesford*. *Bate* lived here. I said, I want you on a charge of concealing the birth of a child some time ago. She said, 'This is all untrue, the child was not above three or four months old, and was born into a pot of boiling water, and was taken away by *Mrs. Anslow* and *Mrs. Bailey*, but I don't know where it was put. . . . I never knew that I was in the family way.' I then took her and *Bailey* into custody. *Bailey* was outside then. I took them to *Hednesford* police station. I went and searched with another witness, and in an old coal-pit shaft near *Hednesford*, we found the dead body of a child wrapped in an old bag, and a brick and a piece of coal tied round its middle. I afterwards returned to the police station, where the three prisoners then were, and I was present when they were all together. They made statements—"

*Young* objected that these statements also were inadmissible, as the inducement held out to *Bailey* in the first instance pervaded the whole matter, and was doubtless communicated by her to the others.

*MONTAGUE SMITH, J.*—I do not think it could affect the other two prisoners; but it will still exclude anything said by *Bailey*.

The constable proceeded: "*Anslow* said, in the presence of the others, 'You know I did not touch the child, but I went with *Mrs. Bailey* to put it down the pit.'"

A doctor proved that the body found in the pit was that of

*REG.*  
*v.*  
*BATE AND*  
*OTHERS.*  
—  
1871.  
—  
*Evidence—*  
*Confession—*  
*Concealment of*  
*Birth.*

REG.  
v.  
BATE AND  
OTHERS.  
—  
1871.  
—  
*Evidence—  
Confession—  
Concealment of  
Birth.*

a fully-developed child. The probability was that it had not breathed.

At the close of the case for the prosecution, the officer of the court was about to read the written statements of the prisoners made before the committing magistrate; but the learned counsel for the defence submitted that that made by Bailey could not be received. It must be assumed that she continued to be influenced at the time of making it by the original invitation to confess from the police-constable, notwithstanding the caution, if any, given by the magistrate.

MONTAGUE SMITH, J.—The caption of the statement attached to the depositions contains the caution [His Lordship read it]. It is drawn from the section of the Act of Parliament, which was framed for the very purpose of dispelling from the prisoner's mind any hope or fear excited by a promise or threat.<sup>(a)</sup>

*Young*.—It is, however, necessary to prove that the caution was given. It is merely a printed form.

MONTAGUE SMITH, J.—It must be presumed that the caution on the depositions had been actually given; but I will allow the fact to be formally proved by a witness present at the committal of the prisoners. The statement of Bailey is admissible.

The statement was read, but it did not affect the prisoner Bate, and

*Young* submitted that no case had been made out against her.

MONTAGUE SMITH, J.—No; she does not appear to have been concerned in the disposal of the body.

*Warren*.—The only evidence, certainly, is that she admits having been delivered of a child, and does not know what has become of it.

MONTAGUE SMITH, J.—That will not do. You must show that the child was taken away at her request or privity. She says it was taken right away, and she does not know where it was put. That is her own statement; and there is no other evidence against her. I think, therefore, there is no evidence against Bate.

His LORDSHIP directed the acquittal of Bate, and the jury found the other prisoners also

*Not guilty.*

(a) 11 & 12 Vict. c. 42 (Jervis' Act), s. 18.

# APPENDIX.

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## MISCELLANEOUS PRECEDENTS.

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### No. I.

*Indictment against the Governor of a Colony for the proclamation of Martial Law, and for acts done whilst such Proclamation was in force.(a)*

MIDDLESEX, } The jurors for our Lady the Queen upon their oath  
M to wit. } present, that heretofore, to wit, in the eleventh and  
twelfth years of the reign of His late Majesty King William the Third, an act  
of Parliament was made and passed for the purpose of hearing and deter-  
mining in the Court of King's Bench in England any oppressions, crimes,  
and offences done and committed after the 1st day of August, 1700, by  
any governor, lieutenant governor, deputy governor, or commander-in-chief  
of any plantation or colony within His then Majesty's dominions beyond  
the seas. And that the said act of Parliament was intituled "An Act to  
punish Governors of Plantations in this Kingdom for Crimes by them  
committed in the Plantations." And the jurors aforesaid, upon their oath  
aforesaid, do further present, that heretofore, to wit, on the 22nd day of  
June, in the year of our Lord 1802, in the forty-second year of the reign  
of His late Majesty King George the Third, an act of Parliament was made  
and passed for the purpose of extending the provisions of the said act of  
Parliament so made and passed in the eleventh and twelfth years of the  
reign of His late Majesty King William the Third. And that the said  
act of Parliament so made and passed in the forty-second year of the reign  
of His late Majesty King George the Third was intituled "An Act for the  
trying and punishing in Great Britain Persons holding Publick Employ-  
ments for Offences committed Abroad." And the jurors aforesaid, upon  
their oath aforesaid, do further present that, on the 13th day of October,  
in the year of our Lord 1865 (and long before), E. J. E. was a person  
employed in the service of Her present Majesty Queen Victoria in a civil  
and military station out of Great Britain, to wit, in the island of Jamaica,  
and that the said E. J. E., being so employed as aforesaid, and whilst he  
was so employed as aforesaid, unlawfully intending to aggrieve and oppress

(a) This indictment was presented to the grand jury of the Courts of Middlesex on the 8th day of June, 1868, and returned, after a charge to them from the senior puisne judge (Justice Blackburn), marked "No true bill." The indictment was carefully prepared, and underwent discussion at a conference of the counsel engaged for the prosecution, viz.: Sir R. P. Collier, Q.C., Mr. Fitzjames Stephen, Q.C., Mr. Edward T. E. Beasley (draftsman), and Mr. J. Horne Payne.

*Precedents.*

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No. I.

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Indictment  
against the  
governor of a  
colony for the  
proclamation  
of martial law,  
and for acts  
done whilst  
such proclama-  
tion was in  
force.

divers subjects of Her said Majesty in the said island of Jamaica within his said command, on the said 13th day of October, in the year aforesaid, at Head Quarters House, in the city of Kingston, in the said island of Jamaica, to wit, in the county of Middlesex, under colour of his said station, unlawfully and oppressively did make and issue a certain illegal and oppressive proclamation. Which said proclamation was in the words and figures following, that is to say :

“ Jamaica S. S.

“ Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, and of Jamaica Supreme Lady, Defender of the Faith,

“ To all our loving subjects :

“ Whereas, we are certified of the committal of grievous trespasses and felonies within the parish of St. Thomas in the East of this our island of Jamaica, and have reason for expecting that the same may be extended to the neighbouring parishes of the county of Surry of our said island, we do hereby, by the authority to us committed by the laws of this our island, declare and announce to all whom it may concern that martial law shall prevail throughout the said county of Surry, except in the city and parish of Kingstown, and that our military forces shall have all power of exercising the rights of belligerents against such of the inhabitants of the said county, except as aforesaid, as our military forces may consider opposed to our Government and the well-being of our loving subjects.

“ Given at Head Quarter House, Kingston, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and sixty-five, and in the twenty-ninth year of our reign.

“ Witness His Excellency E. J. E., Esquire, Captain General and Governor-in-Chief in and over our said island of Jamaica and other the territories thereon depending in America, Governor and Commander-in-Chief of the colony of British Honduras, Chancellor of our said island of Jamaica, and Vice-Admiral of the same.

“ By His Excellency's command,  
E. J., Governor's Secretary.”

“ E. E.

In manifest violation of the liberties of Her Majesty's said subjects, to the great perversion of public justice, and against the peace of our said Lady the Queen, her crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that, after the making and passing of the said several acts of Parliament in the first count of this indictment mentioned, the said E. J. E. was Captain-General and Governor-in-Chief in and over a certain colony within Her Majesty's dominions beyond the seas, to wit, the island of Jamaica ; and that whilst the said E. J. E., was such Governor as aforesaid, to wit, on the 14th day of October, in the year of our Lord 1865, and on divers other days between the day last mentioned and the 13th day of November in the same year, the said E. J. E., so being such Governor as aforesaid, did unlawfully and oppressively cause and procure the said illegal and oppressive proclamation in the said first count mentioned and set forth to be published and maintained in full force and effect within the county of Surry, in the said island of Jamaica, except the city and parish of Kingston in the said island as aforesaid, for a long space of time, to wit, thirty days, to the great perversion of public justice, to the great damage of all the liege subjects of our said Lady the Queen within the said island, and against the peace of our said Lady the Queen, her crown and dignity.

*Third count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that after the making and passing of the said several acts of Parliament in the first count of this indictment mentioned, the said E. J. E. was Captain General, and Governor-in-Chief in and over a certain colony within Her Majesty's dominions beyond the seas, to wit, the island of Jamaica, and that whilst the said E. J. E. was such Governor as aforesaid, to wit, on the 14th day of October, in the year of our Lord 1865, and on divers other days, between that day and the 13th day of November, in the year aforesaid, certain pretended and unlawful courts-martial assembled in divers parts of the county of Surry, in the said island of Jamaica, not being within the parish and city of Kingston, in the said island; and that certain unlawful and pretended courts-martial so assembled as aforesaid proceeded to hear and determine divers grave charges against divers liege subjects of our said Lady the Queen, and that the said unlawful and pretended courts-martial so assembled as aforesaid proceeded to adjudge and sentence divers liege subjects of our said Lady the Queen to divers cruel and unlawful punishments, to wit, flogging and imprisonment. And the jurors aforesaid, upon their oath aforesaid, do further present that, on the said 14th day of October, in the year aforesaid, and on divers other days between the said day last mentioned and the 13th day of November, in the year aforesaid, the said E. J. E. had full knowledge and notice of the said unlawful acts of the said pretended courts-martial as aforesaid. And it became and was the duty of the said E. J. E., as such Governor as aforesaid, to prohibit and prevent the carrying out of the said sentences of the said pretended courts-martial and the infliction of the said unlawful punishments. And that during all the time aforesaid the said E. J. E. had full authority and power as such Governor as aforesaid to prohibit and prevent the said carrying out of the sentences aforesaid and the said inflictions of the unlawful punishments as aforesaid. And that the said E. J. E. unlawfully then and there, to wit, in the county of Middlesex, during all the times as aforesaid, so being such Governor as aforesaid, and so having authority and power as aforesaid, did not and would not prohibit and prevent the carrying out of the said illegal sentences as aforesaid, and the said unlawful punishments as aforesaid, but wholly neglected and refused so to do, contrary to his said duty as such Governor as aforesaid, to the great damage of divers liege subjects of our said Lady the Queen as aforesaid, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that, after the making and passing of the said several acts of Parliament in the first count of this indictment mentioned, to wit, on the 13th day of October, in the year aforesaid, to wit, in the county of Middlesex, the said E. J. E., then being Captain General and Governor-in-Chief in and over a certain colony within Her Majesty's dominions beyond the seas, to wit, the island of Jamaica, did, in the exercise of his said office, make and issue a certain proclamation, and which said proclamation was and is in the words and figures following, that is to say:—

“Jamaica S. S.

“Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, and of Jamaica Supreme Lady, Defender of the Faith,

“To all our loving subjects :

“Whereas, we are certified of the committal of greivous trespasses and felonies within the parish of St. Thomas in the East of this our island of

*Precedents.*

No. I.

Indictment against the governor of a colony for the proclamation of martial law, and for acts done whilst such proclamation was in force.

*Precedents.*

## . No. I.

Indictment  
against the  
governor of a  
colony for the  
proclamation  
of martial law,  
and for acts  
done whilst  
such proclama-  
tion was in  
force.

Jamaica, and have reason for expecting that the same may be extended to the neighbouring parishes of the county of Surry of our said island, we do hereby, by the authority to us committed by the laws of this our island, declare and announce to all whom it may concern that martial law shall prevail throughout the said county of Surry, except in the city and parish of Kingston, and that our military forces shall have all power of exercising the rights of belligerents against such of the inhabitants of the said county, except as aforesaid, as our military forces may consider opposed to our Government and the well being of our loving subjects.

“Given at Head Quarters House, Kingston, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and sixty-five, and in the twenty-ninth year of our reign.

“Witness, his Excellency E. J. E. Esquire, Captain General and Governor-in-Chief in and over our said island of Jamaica and other the territories thereon depending in America, Governor and Commander-in-Chief of the colony of British Honduras, Chancellor of our said island of Jamaica, and Vice-Admiral of the same,

“By His Excellency's command,  
E. J., Governor's Secretary.”

“E. E.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., in pursuance of, and under and by virtue of the said proclamation, did declare that martial law should prevail throughout the said county of Surry, in the said proclamation mentioned, except in the city and parish of Kingston, therein mentioned, and did profess to empower the military forces of our said Lady the Queen then and there being, to exercise the rights of belligerents against such of the inhabitants of the said county, except as therein and hereinbefore mentioned, as the said military forces might consider opposed to the Government of our said Lady the Queen, and the well-being of her subjects. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., then and there being such Governor as aforesaid, and whilst he was such Governor as aforesaid, to wit, on the 17th day of October, in the year aforesaid, to wit, in the county of Middlesex, unlawfully, oppressively, and without any lawful or reasonable authority whatsoever, and under the false colour and pretence of acting under and in accordance with the said proclamation, and under and by virtue of the laws then and there in force, did cause and procure one G. W. G. to be taken into custody and imprisoned for a long space of time, to wit, for two hours at a certain place, not being within the district within which martial law had so been declared and proclaimed, but, on the contrary, in a certain place excepted from the operation of the said proclamation, and the said martial law, to wit, in the parish of Kingston aforesaid, and that the said E. J. E., so then being such Governor as aforesaid, and whilst he was such Governor afterwards, to wit, on the 18th day of October, in the year aforesaid, unlawfully, oppressively, and without any lawful or reasonable authority whatsoever, and under the false colour and pretence of acting under and in accordance with the said proclamation, and under and by virtue of the laws then and there in force, did cause and procure the said G. W. G. to be unlawfully and forcibly removed and conveyed from and out of the said parish of Kingston, where he then was, into and upon a certain ship called the *Wolverine*, and unlawfully and oppressively did cause the said G. W. G. to be unlawfully kept, detained, and imprisoned, on board the said ship for a long space of time, to wit, for three days, and to be



unlawfully, wrongfully, and oppressively, without any lawful authority in that behalf, carried on board the said ship from the said parish of Kingston, to a certain place called Morant Bay, in the parish of St. Thomas-in-the-East, in the said island of Jamaica. And that the said E. J. E., so then being such Governor as aforesaid, and whilst he was such Governor afterwards, to wit, on the 20th day of October, in the year aforesaid, unlawfully, oppressively, and without any lawful or reasonable authority whatsoever, and under the false colour and pretence of acting under and in accordance with the said proclamation, and under and by virtue of the laws then and there in force, did cause and procure the said G. W. G. to be unlawfully, and forcibly removed and conveyed from and out of the said ship called the *Wolverine*, where he then was, and to be delivered into the custody of one A. A. N., then acting as Brigadier-General in command of certain military forces of our said Lady the Queen at Morant Bay aforesaid, and to be imprisoned at Morant Bay aforesaid, and to be kept, and detained so imprisoned for a long space of time, to wit, for three days, to the great injury, oppression, and damage, of the said G. W. G., and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

No. I.

Indictment  
against the  
governor of a  
colony for the  
proclamation  
of martial law,  
and for acts  
done whilst  
such proclama-  
tion was in  
force.

*Fifth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, unlawfully intending to injure, prejudice, and oppress one G. W. G., then being in the said parish and city of Kingston, afterwards and whilst he was so employed as aforesaid, to wit, on the 17th day of October, A. D. 1865, to wit, in the county of Middlesex, unlawfully, oppressively, and without any reasonable or lawful cause whatsoever, under colour of his said station, did cause and procure the said G. W. G. to be taken into custody, and imprisoned and to be kept and detained so imprisoned for a long space of time, to wit, for two hours in the said parish and city of Kingston in the said island of Jamaica, and other wrongs to the said G. W. G., then and there did, to the great injury, oppression, and damage of the said G. W. G., and against the peace of our said Lady the Queen, her crown and dignity.

*Sixth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid, unlawfully intending to injure, prejudice, and oppress one G. W. G., afterwards, to wit, on the 18th day of October, in the year of our Lord 1865, to wit, in the county of Middlesex, unlawfully, oppressively, and without any reasonable or lawful cause whatsoever, under colour of his said station, did cause and procure the said G. W. G. to be forcibly removed and conveyed from and out of the said parish and city of Kingston, where he then was, into and upon a certain ship, to wit, Her Majesty's ship *Wolverine*, and there to be imprisoned and to be kept and detained so imprisoned for a long space of time, to wit, for three days, and to be carried in the said ship from the said parish and city of Kingston to Morant Bay in the parish of St. Thomas-in-the-East in the said island of Jamaica, and other wrongs to the said G. W. G. then and there did, to the great injury, oppression, and damage of the said G. W. G., and against the peace of our said Lady the Queen, her crown and dignity.

*Seventh count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid, unlawfully intending to injure, prejudice, and oppress one G. W. G., afterwards,

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to wit, on the 20th day of October, in the year of our Lord 1865, to wit, in the county of Middlesex, unlawfully and oppressively, under colour of his said station, did cause and procure the said G. W. G. to be forcibly removed and conveyed from and out of Her Majesty's ship *Wolverine* into the custody of one A. A. N. then acting as Brigadier-General in command of certain military forces at Morant Bay in the said island of Jamaica, and to be imprisoned at Morant Bay aforesaid, and to be kept and detained so imprisoned for a long space of time, to wit, for three days, and other wrongs to the said G. W. G. then and there did, to the great injury, oppression, and damage of the said G. W. G., and against the peace of our said Lady the Queen, her crown and dignity.

*Eighth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid, unlawfully intending to injure, prejudice, and oppress one G. W. G., afterwards, to wit, on the 21st day of October, in the year of our Lord 1865, to wit, in the county of Middlesex, unlawfully and oppressively, under colour of his said station, did cause and procure the said G. W. G. to be taken into custody before a certain illegal, and oppressive tribunal, to wit, a pretended court-martial, composed of two officers of Her Majesty's Naval Service, and one officer of Her Majesty's Army, then and there to answer and defend himself upon certain grave charges, to wit, high treason and rebellion against our said Lady the Queen. And that the said pretended tribunal did hold a pretended court, and did conduct the proceedings before the same, in contravention of the laws then and there in force, and of the rules of natural justice, and did find the said G. W. G. to be guilty of the charges aforesaid, and did adjudge the said G. W. G. to suffer certain punishment, and that the said E. J. E., well knowing the premises, and being such Governor as aforesaid, did unlawfully authorise, approve, ratify, and sanction the said unlawful and oppressive acts then and there done and committed by the said illegal tribunal, to the great injury, oppression, and damage of the said G. W. G., and against the peace of our said Lady the Queen, her crown and dignity.

*Ninth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid, afterwards, to wit, on the 23rd day of October, in the year of our Lord 1865, to wit, in the county of Middlesex, unlawfully and oppressively, and intending to injure one R. G. B., did cause and procure the said R. G. B. to be taken into custody at a certain place, to wit, Vere, in the county of Middlesex, in the said island of Jamaica, which said place was not within the district within which martial law had been declared and proclaimed under the colour and pretence of the said proclamation in the first count of this indictment set forth, and unlawfully did cause and procure the said R. G. B., so being in such unproclaimed place as aforesaid, to be forcibly removed and conveyed from and out of the said place into a certain other place, to wit, Morant Bay, in the said county of Surry, in the said island of Jamaica, which said other place was within the district within which martial law had been declared and proclaimed under the colour and pretence of the said proclamation as aforesaid, and there to be delivered into the custody of certain officers and soldiers, and there to be unlawfully imprisoned and detained for a long space of time, to wit, for fifty-five days, and other wrongs to the said R. G. B., then and there did, to the great injury,

oppression, and damage of the said R. G. B., and against the peace of our said Lady the Queen, her crown and dignity. Precedents.

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*Tenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., so being such Governor as aforesaid, and so being employed as aforesaid afterwards, and whilst he was such Governor, and whilst he was so employed, to wit, on the 23rd day of October, in the year aforesaid, in and upon one R. G. B., in the peace of God and our said Lady the Queen then and there being, unlawfully and under colour of his said office and employment, did make an assault, and him the said R. G. B. falsely, unlawfully oppressively, and against the will of the said R. G. B., and against the laws then and there in force, and without any legal warrant or authority, did imprison, and detain for the space of sixty days, and other wrongs to the said R. G. B. then and there did, to the great damage of the said R. G. B., and against the peace of our said Lady the Queen, her crown and dignity. Indictment against the governor of a colony for the proclamation of martial law, and for acts done whilst such proclamation was in force.

*Eleventh count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid afterwards, to wit, on the 23rd day of October, in the year of our Lord 1865, to wit, in the county of Middlesex, unlawfully, and oppressively, and intending to injure one A. P., did cause and procure the said A. P. to be taken into custody at a certain place, to wit, Vere, in the county of Middlesex, in the said island of Jamaica, which said place was not within the district within which martial law had been declared and proclaimed under the colour and pretence of the said proclamation in the first count of this indictment set forth, and unlawfully did cause and procure the said A. P., so being in such unproclaimed place as aforesaid, to be forcibly removed and conveyed from and out of the said place into a certain other place, to wit, Morant Bay, in the said county of Surry, in the said island of Jamaica, which said other place was within the district within which martial law had been declared and proclaimed, under the colour and pretence of the said proclamation as aforesaid, and there to be delivered into the custody of certain officers and soldiers, and there to be unlawfully imprisoned and detained for a long space of time, to wit, for eight days, and other wrongs to the said A. P. then and there did, to the great injury, oppression, and damage of the said A. P., and against the peace of our said Lady the Queen, her crown and dignity.

*Twelfth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., so being such Governor as aforesaid, and so being employed as aforesaid afterwards, and whilst he was such Governor, and whilst he was so employed as aforesaid, to wit, on the 23rd day of October, in the year aforesaid, in and upon A. P., in the peace of God and our said Lady the Queen then and there being, unlawfully and under colour of his said office and employment, did make an assault and him the said A. P., falsely, unlawfully, and oppressively, and against the will of the said A. P., and against the laws then and there in force, and without any legal warrant or authority, did imprison, and detain, for the space of twelve days, and other wrongs to the said A. P. then and there did, to the great damage of the said A. P., and against the peace of our said Lady the Queen, her crown and dignity.

*Thirteenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., whilst he was such Governor and whilst he was so employed as aforesaid, to wit, on the 4th day of November in the year aforesaid, in and upon the said A. P., unlawfully,

*Precedents.*

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force.

and oppressively, and under colour of his said office and employment, did make an assault and him, the said A. P., did beat, flog, wound, and ill-treat, and other wrongs to the said A. P. then and there did, to the great damage of the said A. P., and against the peace of our said Lady the Queen, her crown and dignity.

*Fourteenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid, afterwards, to wit, on the 23rd day of October, in the year of our Lord 1865, to wit, in the county of Middlesex, unlawfully, and oppressively, and intending to injure one B. M., did cause and procure the said B. M. to be taken into custody at a certain place, to wit, Vere, in the county of Middlesex, in the said island of Jamaica, which said place was not within the district within which martial law had been declared and proclaimed under the colour and pretence of the said proclamation in the first count of this indictment set forth, and unlawfully did cause and procure the said B. M., so being in such unproclaimed place as aforesaid, to be forcibly removed and conveyed from and out of the said place to a certain other place, to wit, Morant Bay, in the said county of Surry, in the said island of Jamaica, which said other place was within the district within which martial law had been declared and proclaimed under the colour and pretence of the said proclamation as aforesaid, and there to be delivered into the custody of certain officers and soldiers, and there to be unlawfully imprisoned and detained for a long space of time, to wit, for eight days, and other wrongs to the said B. M. then and there did, to the great injury, oppression, and damage of the said B. M., and against the peace of our said Lady the Queen, her crown and dignity.

*Fifteenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. J. E., whilst he was such Governor as aforesaid, and whilst he was so employed as aforesaid, to wit, on the 23rd day of October, in the year aforesaid, under colour of his said office and employment, in and upon B. M., in the peace of God and our said Lady the Queen then and there being, unlawfully did make an assault, and him, the said B. M., falsely, unlawfully, oppressively, and against the will of the said B. M., and against the laws then and there in force, and without any legal warrant or authority, did imprison and detain for the space of twelve days, and other wrongs to the said B. M. then did, to the great damage of the said B. M., and against the peace of our said Lady the Queen, her crown and dignity.

*Sixteenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. J. E., whilst he was such Governor as aforesaid, and whilst he was so employed as aforesaid, afterwards, to wit, on the 4th day of November, in the year aforesaid, under colour of his said office and employment, in and upon the said B. M. unlawfully and oppressively did make an assault, and him, the said B. M., unlawfully did beat, flog, wound, and ill-treat, and other wrongs to the said B. M. then and there did, to the great damage of the said B. M., and against the peace of our said Lady the Queen, her crown and dignity.

*Seventeenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid, afterwards, to wit, on the 21st day of October, A.D. 1865, to wit, in the county of Middlesex, unlawfully and oppressively, and intending to injure one F. A. B. V., did cause and procure the said F. A. B. V. to be taken into

custody at a certain place, to wit, Kingston, in the said county of Surry, in the said island of Jamaica, which said place was not within the district within which martial law had been declared and proclaimed, under the colour and pretence of the said proclamation in the first count of this indictment set forth, and unlawfully did cause and procure the said F. A. B. V., so being in such unproclaimed place as aforesaid, to be forcibly removed and conveyed from and out of the said place into a certain other place, to wit, Uppark Camp, in the said county of Surry, in the said island of Jamaica, which said other place was within the district within which martial law had been declared and proclaimed, under the colour and pretence of the said proclamation as aforesaid, and there to be delivered into the custody of certain officers and soldiers, and there to be unlawfully imprisoned and detained for a long space of time, to wit, for twenty-one days, and other wrongs to the said F. A. B. V. then and there did, to the great injury, oppression, and damage of the said F. A. B. V., and against the peace of our said Lady the Queen, her crown and dignity.

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*Eighteenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. J. E., whilst he was such Governor as aforesaid, and whilst he was so employed as aforesaid, to wit, on the 21st day of October, in the year aforesaid, under colour of his said office and employment, in and upon F. A. B. V., in the peace of God and our said Lady the Queen then and there being, unlawfully did make an assault, and him, the said F. A. B. V., falsely, unlawfully, oppressively, and against the will of the said F. A. B. V., and against the laws then and there in force, and without any legal warrant or authority, did imprison and detain for the space of twenty-one days, and other wrongs to the said F. A. B. V. then did, to the great damage of the said F. A. B. V., and against the peace of our said Lady the Queen, her crown and dignity.

*Nineteenth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. J. E., being so employed in such station as aforesaid, and whilst he was so employed as aforesaid afterwards, to wit, on the 1st day of November, A.D. 1865, to wit, in the county of Middlesex, unlawfully and oppressively, and intending to injure one S. L., did cause and procure the said S. L. to be taken into custody at a certain place, to wit, Montego Bay, in the county of Cornwall, in the said island of Jamaica, which said place was not within the district within which martial law had been declared and proclaimed, under the colour and pretence of the said proclamation in the first count of this indictment set forth, and unlawfully did cause and procure the said S. L., so being in such unproclaimed place as aforesaid, to be forcibly removed and conveyed from and out of the said place into a certain other place, to wit, Morant Bay, in the said county of Surry, in the said island of Jamaica, which said other place was within the district within which martial law had been declared and proclaimed, under the colour and pretence of the said proclamation as aforesaid, and there to be delivered into the custody of certain officers and soldiers, and there to be unlawfully imprisoned and detained for a long space of time, to wit, for thirty-six days, and other wrongs to the said S. L. then and there did, to the great injury, oppression, and damage of the said S. L., and against the peace of our said Lady the Queen, her crown and dignity.

*Twentieth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. J. E., whilst he was such Governor as aforesaid, and whilst he was so employed as aforesaid, to wit, on the 1st day of November, in the year aforesaid, under colour of his said office



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and employment, in and upon S. L., in the peace of God and our said Lady the Queen then and there being, unlawfully did make an assault, and him, the said S. L., falsely, unlawfully, oppressively, and against the will of the said S. L., and against the laws then and there in force, and without any legal warrant or authority, did imprison and detain for the space of thirty-eight days, and other wrongs to the said S. L. then did, to the great damage of the said S. L., and against the peace of our said Lady the Queen, her crown and dignity.

*Twenty-first count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. J. E., at the time of the commission of the offences and misdemeanors hereinafter in this count mentioned, was a person employed in the service of our said Lady the Queen out of Great Britain, and then was Captain-General and Governor-in-Chief in and over the island of Jamaica, and other the territories thereon depending in America, and then was Governor and Commander-in-Chief of the colony of British Honduras, and Chancellor of the said island of Jamaica, and Vice-Admiral of the same. And the jurors aforesaid, upon their oath aforesaid, do further present that the said E. J. E., not regarding his duty in that behalf, unlawfully and maliciously devising and intending to oppress divers of the liege subjects of our said Lady the Queen then residing and being in the said island of Jamaica, did, on the 17th day of October, in the year aforesaid, and on divers other days and times between that day and the 22nd day of December, in the year aforesaid, to wit, at Westminster, in the county of Middlesex, unjustly, unlawfully, maliciously, and oppressively, under colour of his said office and employment, and contrary to the laws of the realm, cause and procure divers of Her Majesty's liege subjects then inhabiting the said island, to wit, one G. W. G., one A. P., one B. M., one R. G. B., one S. L., and one F. A. B. V., and divers other persons, to be illegally and without sufficient warrant in that behalf arrested and imprisoned, contrary to the said laws, and did unlawfully and maliciously, and under colour of his said office and employment, contrary to the said laws, cause and procure the said G. W. G. and divers other persons to be brought to trial before a certain unlawful and pretended tribunal upon certain grave charges, and unlawfully, knowingly, and oppressively, and contrary to his duty in that behalf, did sanction by his authority the findings and sentences of the said unlawful and pretended tribunal upon the trials of the said persons, and did unlawfully, maliciously, and under colour of his said office and employment, cause and procure the said A. P. and B. M. to be falsely imprisoned and detained for many days, and to be unlawfully flogged, beaten, and punished respectively, they, the said A. P. and B. M., at the time they were so flogged, beaten, and punished as aforesaid, not having been tried for any offence before any tribunal whatsoever, nor charged with any offence whatsoever, and did unlawfully and maliciously, and under colour of his said office and employment, and contrary to the laws then and there in force, cause, procure, and induce the officers commanding the troops of our said Lady the Queen, and the said troops then being in the island of Jamaica, to treat divers large numbers of the liege subjects of our said Lady the Queen then inhabiting the said island of Jamaica as alien enemies, and did cause and procure the said liege subjects as aforesaid to be cruelly oppressed, wounded, and beaten, and did cause and procure divers houses and other property of divers of the said liege subjects situate in the said island of Jamaica to be burnt and destroyed, without any sufficient cause or justification for the same, and under colour of his



said office and employment did unlawfully, maliciously, and oppressively cause and procure the said R. G. B., F. A. B. V., and S. L., liege subjects of our said Lady the Queen as aforesaid, to be unlawfully imprisoned for a long space of time, to wit, for many days, without the said R. G. B., F. A. B. V., and S. L., being brought to trial for any offence, and did cause and procure the said R. G. B. and S. L. to be unlawfully and oppressively imprisoned and detained, to wit, in the custody of one A. A. N. for a long space of time after the said A. A. N. and others, then being officers of the troops of our said Lady the Queen, had duly certified and made known to the said E. J. E. that the said R. G. B. and S. L. could not legally be detained by them. To the great damage of the said G. W. G., the said A. P., the said B. M., the said R. G. B., the said S. L., the said F. A. B. V., and the said liege subjects of our said Lady the Queen, in contempt of our said Lady the Queen and her laws. In manifest violation of the liberties of the subjects of our said Lady the Queen. To the great perversion of public justice. In breach and violation of the duty of his said office as such Governor and officer as aforesaid, and against the peace of our said Lady the Queen, her crown and dignity.

Precedents.

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tion was in  
force.

## No. II.

*Indictment for presenting a False Cheque.*

MIDDLESEX, } The jurors for our Lady the Queen upon their oath  
to wit. } present, that B. F. P. did, on the 17th day of  
February, A.D. 1868, unlawfully, knowingly, and designedly, falsely pretend  
to H. H. and C. H., carrying on business in partnership as tailors, under  
the name and style of Messrs. H. Brothers, that he, the said B. F. P.,  
had then authority to draw a certain cheque, to wit, a cheque for the  
sum of 10*l.* sterling upon the Wilts and Dorset Banking Company, in  
the city of Bath, in the county of Somerset, and that a sum of 10*l.*  
sterling, belonging to him, the said B. F. P., was then in the possession  
of the said Banking Company, and that a sum of 10*l.* sterling was  
then payable and could be paid by the said Banking Company on the  
credit and on the account of the said B. F. P. as soon as an order in  
writing, signed by the said B. F. P., authorising the said Banking  
Company to make such payment, should be presented at the place of  
business of the said Banking Company at Bath, in the said county of  
Somerset; and that a certain paper writing, in the proper handwriting of  
the said B. F. P., was a good and valid order for the payment of 10*l.*  
sterling and of the value of 10*l.* sterling, and that a certain banker's  
cheque, bearing a stamp of 1*d.*, and filled up for a sum of 10*l.* sterling was  
a good and valid security for the sum of 10*l.* sterling, and of the value of  
10*l.* sterling; and that a certain cheque, which was then written and made  
by the said B. F. P. upon one of the printed and stamped forms of the  
Wilts and Dorset Banking Company, and which said cheque was then  
addressed to the said Banking Company, at their place of business, in the

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city of Bath, in the said county of Somerset, and which said cheque purported to be an order upon the said Banking Company to pay to him, the said B. F. P., and any endorsee of him, the said B. F. P., the sum of 10*l.* sterling, and which said cheque was endorsed by the proper signature of him, the said B. F. P., was a valuable security, to wit, an order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, by means of which said false pretences the said B. F. P. did then and there unlawfully obtain from the said firm of Messrs. H. Brothers the sum of 10*l.* in money, of the moneys of the said Messrs. H. Brothers, with intent thereby then to defraud. Whereas, in truth and in fact, the said B. F. P. had not any authority to draw the said cheque upon the said Banking Company for the sum of 10*l.*, or any other cheque for any sum of money whatsoever; and whereas, in truth and in fact, the said Banking Company had not then in their possession a sum of 10*l.* sterling belonging to the said B. F. P., or any other sum of money whatsoever; and whereas, in truth and in fact, a sum of 10*l.* sterling was not then payable by the said Banking Company upon the order of the said B. F. P., or any other sum of money whatsoever; nor could 10*l.* sterling, or any other sum of money, be paid by the said Banking Company upon the credit and account of the said B. F. P. when any written order of the said B. F. P. was presented to the said Banking Company; and whereas, in truth and in fact, the said paper writing was not a good and valid order for the payment of 10*l.* sterling, and was not of the value of 10*l.*, but, on the contrary, was invalid, and not of any value whatsoever; and whereas, in truth and in fact, the said banker's cheque was not a good and valid security for the sum of 10*l.* sterling, or any other sum whatsoever, and was not of the value of 10*l.* sterling, or of any other sum whatsoever; and whereas, in truth and in fact, the said cheque so written, made, and endorsed by the said B. F. P. was not a valuable security, and was not of the value of 10*l.* sterling, but, on the contrary, was not of any value whatsoever, as he, the said B. F. P., then and there well knew, to the great damage and disgrace of the said Messrs. H. Brothers, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Second count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the day and year aforesaid, the said B. F. P., unlawfully, knowingly, and designedly, did falsely pretend to one T. B. N. that he, the said B. F. P., had then authority to draw a certain cheque, to wit, a cheque for the sum of 10*l.* sterling upon the Wilts and Dorset Banking Company, in the city of Bath, in the county of Somerset, and that a sum of 10*l.* sterling, belonging to him, the said B. F. P., was then in the possession of the said Banking Company, and that a sum of 10*l.* sterling was then payable and could be paid by the said Banking Company on the credit and on the account of the said B. F. P. as soon as an order in writing, signed by the said B. F. P., authorising the said Banking Company to make such payment, should be presented at the place of business of the said Banking Company at Bath, in the said county of Somerset; and that a certain paper writing, in the proper handwriting of the said B. F. P., was a good and valid order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, and that a certain banker's cheque, bearing a stamp of 1*d.*, and filled up for a sum of 10*l.* sterling, was a good and valid security for the sum of 10*l.* sterling and of the value of 10*l.* sterling; and that a certain cheque, which was then written and made by the said B. F. P. upon one of the printed

and stamped forms of the Wilts and Dorset Banking Company, and which said cheque was then addressed to the said Banking Company, at their place of business, in the city of Bath, in the said county of Somerset, and which said cheque purported to be an order upon the said Banking Company to pay to him, the said B. F. P., and any endorsee of him, the said B. F. P., the sum of 10*l.* sterling, and which said cheque was endorsed by the proper signature of him, the said B. F. P., was a valuable security, to wit, an order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, by means of which said false pretences the said B. F. P. did then and there unlawfully obtain from T. R. N. the sum of 10*l.* in money, of the moneys of the said T. R. N., with intent thereby then to defraud. Whereas, in truth and in fact, the said B. F. P. had not any authority to draw the said cheque upon the said Banking Company for the sum of 10*l.*, or any other cheque for any sum of money whatsoever; and whereas, in truth and in fact, the said Banking Company had not then in their possession a sum of 10*l.* sterling belonging to the said B. F. P., or any other sum of money whatsoever; and whereas, in truth and in fact, a sum of 10*l.* sterling was not then payable by the said Banking Company upon the order of the said B. F. P., or any other sum of money whatsoever; nor could 10*l.* sterling, or any other sum of money be paid by the said Banking Company upon the credit and account of the said B. F. P. when any written order of the said B. F. P. was presented to the said Banking Company; and whereas, in truth and in fact, the said paper writing was not a good and valid order for the payment of 10*l.* sterling, and was not of the value of 10*l.*, but, on the contrary, was invalid, and not of any value whatsoever; and whereas, in truth and in fact, the said banker's cheque was not a good and valid security for the sum of 10*l.* sterling, or any other sum whatsoever, and was not of the value of 10*l.* sterling, or of any other sum whatsoever; and whereas, in truth and in fact, the said cheque so written, made, and endorsed by the said B. F. P. was not a valuable security, and was not of the value of 10*l.* sterling, but, on the contrary, was not of any value whatsoever, as he, the said B. F. P., then and there well knew, to the great damage and disgrace of the said T. R. N., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

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Indictment for  
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false cheque.

*Third count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the day and year aforesaid, the said B. F. P., unlawfully, knowingly, and designedly, did falsely pretend to one J. H. that he, the said B. F. P., had then authority to draw a certain cheque, to wit, a cheque for the sum of 10*l.* sterling upon the Wilts and Dorset Banking Company, in the city of Bath, in the county of Somerset, and that a sum of 10*l.* sterling, belonging to him, the said B. F. P., was then in the possession of the said Banking Company, and that a sum of 10*l.* sterling was then payable and could be paid by the said Banking Company on the credit and on the account of the said B. F. P. as soon as an order in writing, signed by the said B. F. P., authorising the said Banking Company to make such payment, should be presented at the place of business of the said Banking Company at Bath, in the said county of Somerset; and that a certain paper writing, in the proper handwriting of the said B. F. P., was a good and valid order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, and that a certain banker's cheque, bearing a stamp of 1*d.*, and filled up for a sum of 10*l.* sterling, was a good and valid security for the sum of 10*l.* sterling, and of the

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value of 10*l.* sterling; and that a certain cheque, which was then written and made by the said B. F. P. upon one of the printed and stamped forms of the Wilts and Dorset Banking Company, and which said cheque was then addressed to the said Banking Company, at their place of business, in the city of Bath, in the said county of Somerset, and which said cheque purported to be an order upon the said Banking Company to pay to him, the said B. F. P., and any endorsee of him, the said B. F. P., the sum of 10*l.* sterling, and which said cheque was endorsed by the proper signature of him, the said B. F. P., was a valuable security, to wit, an order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, by means of which said false pretences the said B. F. P. did then and there unlawfully obtain from J. H. the sum of 10*l.* in money, of the moneys of the said J. H., with intent thereby then to defraud. Whereas, in truth and in fact, the said B. F. P. had not any authority to draw the said cheque upon the said Banking Company for the sum of 10*l.*, or any other cheque for any sum of money whatsoever; and whereas, in truth and in fact, the said Banking Company had not then in their possession a sum of 10*l.* sterling belonging to the said B. F. P., or any other sum of money whatsoever; and whereas, in truth and in fact, a sum of 10*l.* sterling was not then payable by the said Banking Company upon the order of the said B. F. P., or any other sum of money whatsoever; nor could 10*l.* sterling, or any other sum of money be paid by the said Banking Company upon the credit and account of the said B. F. P. when any written order of the said B. F. P. was presented to the said Banking Company; and whereas, in truth and in fact, the said paper writing was not a good and valid order for the payment of 10*l.* sterling, and was not of the value of 10*l.*, but, on the contrary, was invalid, and not of any value whatsoever; and whereas, in truth and in fact, the said banker's cheque was not a good and valid security for the sum of 10*l.* sterling, or any other sum whatsoever, and was not of the value of 10*l.* sterling, or of any other sum whatsoever; and whereas, in truth and in fact, the said cheque so written, made, and endorsed by the said B. F. P. was not a valuable security, and was not of the value of 10*l.* sterling, but, on the contrary, was not of any value whatsoever, as he, the said B. F. P., then and there well knew, to the great damage and disgrace of the said J. H., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Fourth count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the day and year aforesaid, the said B. F. P., unlawfully, knowingly, and designedly, did falsely pretend to one C. H. that he, the said B. F. P., had then authority to draw a certain cheque, to wit, a cheque for the sum of 10*l.* sterling upon the Wilts and Dorset Banking Company, in the city of Bath, in the county of Somerset, and that a sum of 10*l.* sterling, belonging to him, the said B. F. P., was then in the possession of the said Banking Company, and that a sum of 10*l.* sterling was then payable and could be paid by the said Banking Company on the credit and on the account of the said B. F. P. as soon as an order in writing, signed by the said B. F. P., authorising the said Banking Company to make such payment, should be presented at the place of business of the said Banking Company at Bath, in the said county of Somerset; and that a certain paper writing, in the proper handwriting of the said B. F. P., was a good and valid order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, and that a certain banker's cheque bearing a stamp of 1*d.*, and filled up for a sum of

10*l.* sterling, was a good and valid security for the sum of 10*l.* sterling and of the value of 10*l.* sterling; and that a certain cheque, which was then written and made by the said B. F. P. upon one of the printed and stamped forms of the Wilts and Dorset Banking Company, and which said cheque was then addressed to the said Banking Company, at their place of business, in the city of Bath, in the said county of Somerset, and which said cheque purported to be an order upon the said Banking Company to pay to him, the said B. F. P., and any endorsee of him, the said B. F. P., the sum of 10*l.* sterling, and which said cheque was endorsed by the proper signature of him, the said B. F. P., was a valuable security, to wit, an order for the payment of 10*l.* sterling and of the value of 10*l.* sterling, by means of which said false pretences the said B. F. P. did then and there unlawfully obtain from C. H. the sum of 10*l.* in money, of the moneys of the said C. H. with intent thereby then to defraud. Whereas, in truth and in fact, the said B. F. P. had not any authority to draw the said cheque upon the said Banking Company for the sum of 10*l.*, or any other cheque for any sum of money whatsoever; and whereas, in truth and in fact, the said Banking Company had not then in their possession a sum of 10*l.* sterling belonging to the said B. F. P., or any other sum of money whatsoever; and whereas, in truth and in fact a sum of 10*l.* sterling was not then payable by the said Banking Company upon the order of the said B. F. P., or any other sum of money whatsoever; nor could 10*l.* sterling, or any other sum of money, be paid by the said Banking Company upon the credit and account of the said B. F. P., when any written order of the said B. F. P. was presented to the said Banking Company; and whereas, in truth and in fact, the said paper writing was not a good and valid order for the payment of 10*l.* sterling, and was not of the value of 10*l.*, but, on the contrary, was invalid, and not of any value whatsoever: and whereas, in truth and in fact, the said banker's cheque was not a good and valid security for the sum of 10*l.* sterling, or any other sum whatsoever, and was not of the value of 10*l.* sterling, or of any other sum whatsoever; and whereas, in truth and in fact, the said cheque so written, made, and endorsed by the said B. F. P. was not a valuable security, and was not of the value of 10*l.* sterling, but, on the contrary, was not of any value whatsoever, as he, the said B. F. P., then and there well knew, to the great damage and disgrace of the said C. H., against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

*Precedents.*

No. II.

Indictment for  
presenting a  
false cheque.



STATUTES AND PARTS OF STATUTES AFFECTING  
THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1866.

PROSECUTION EXPENSES ACT.

29 & 30 VIOT. CAP. 52.

*An Act to extend the Law relating to the Expenses of Prosecutions, and to make Provision for Expenses on Charges of Felony and certain Misdemeanors before examining Magistrates.*—[23rd July, 1866.]

WHEREAS by the act of the seventh year of King George the Fourth, chapter sixty-four, certain provisions were made relating to the allowance of costs, expenses, and compensation to prosecutors and witnesses in cases of prosecutions for felonies and certain misdemeanors therein mentioned, and by an act of the session of the fourteenth and fifteenth year of Her Majesty, chapter fifty-five, the provisions of the said act are extended, and authority is given to one of Her Majesty's Secretaries of State to regulate the scale of payment to be allowed or ordered under the said act or any other act, as to the rates or scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expense of any prosecutor or witnesses attending before such magistrate or magistrates: and whereas it is expedient to extend the law relating to expenses in cases of prosecutions to the payment of expenses incurred in attending before an examining magistrate or magistrates, and to compensation for trouble and loss of time therein on any charge of felony *bonâ fide* made, and on any case of the several classes of misdemeanor enumerated in section twenty-three of the said act of King George the Fourth, or of section two of the said act of Her Majesty, *bonâ fide* preferred, although the parties may not be bound over by recognisance or subpoena to prosecute or give evidence, and although no committal for trial may take place: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Powers of  
examining  
magistrate to  
grant certifi-  
cate of ex-  
penses to  
witnesses  
extended, and  
petty session  
clerks to be  
entitled to fees  
on depositions.

Sect. 1. It shall and may be lawful for any magistrate or magistrates, at his or their discretion, and he or they is and are hereby authorised and empowered, at the request of any prosecutor or other person who shall have appeared before such magistrate or magistrates, either by summons or otherwise, on a charge of felony, *bonâ fide* made upon reasonable and probable cause, or on a charge in any case of the several misdemeanors enumerated in section twenty-three of the said act of King George the Fourth, and of section two of the said act of Her Majesty, *bonâ fide* preferred, and who shall have been examined on such charge of felony and misdemeanor, to grant a certificate of the expenses and of the amount to



be allowed for trouble and loss of time to the witnesses so appearing and examined on such charge of felony or misdemeanor, in the same manner and to the same or like extent as magistrates are authorised by law to do in cases of felony and in cases of misdemeanor enumerated in the said acts, where a committal for trial takes place or the parties are bound over by recognisance or subpoena to prosecute and give evidence; and it shall also be lawful for such examining magistrate or magistrates to allow to the clerk of the magistrates acting for the petty sessional division or district (except where such clerk is paid by salary in lieu of fees) the same fees on taking the depositions on such charge or charges as would be allowed to him, or he would be entitled to at law, in the event of a committal for trial taking place, and to include such allowance of fees in the certificate.

29 & 30 Vict.  
c. 52.

—  
*Prosecution  
Expenses Act.*  
—

2. Every examining magistrate signing or granting such certificate shall forward the same to the clerk of the peace of the county, riding, division, city, or borough within which such petty sessional division or district is situate, to be laid by him before the next quarter sessions of the peace for such county, riding, division, city, or borough; and such court shall be at liberty to allow the amount or so much of the amount named in the certificate, on the same being certified by the proper officer of the court of quarter sessions as correct, in accordance with the scale of payment fixed or to be from time to time fixed under section five of the act of Her Majesty before referred to, and thereupon to sign an order for payment on the treasurer or other officer of the county, riding, or division, or city, liberty, or franchise, in which the offence shall have been committed or supposed to have been committed, in the same manner as an order for payment would have been made in case the parties had been bound over to prosecute, and an indictment had been preferred, and such treasurer or other officer shall pay the amount of such order to the person or persons named therein.

Magistrates  
signing, &c.,  
certificates to  
forward same  
to clerks of the  
peace to be  
laid before  
court of quar-  
ter sessions,  
which may  
allow amount  
wholly or par-  
tially, and  
make orders  
for payment.

3. This act shall continue in force for three years next after the passing thereof, and thence to the end of the then next session of Parliament.

Duration of  
act.

4. This act shall not extend to Ireland or Scotland.

Application of  
act.

## REFORMATORY SCHOOLS ACT.

29 & 30 VICT. CAP. 117.

*An Act to consolidate and amend the Acts relating to Reformatory Schools in Great Britain.*—[10th August, 1866.]

Sect. 1. This act may be cited as "The Reformatory Schools Act, Short title. 1866."

2. This act shall not extend to Ireland.

3. "Managers" shall include any person or persons having the management or control of any school to which this act applies:

"Justice" shall apply to England only, and shall mean a justice of the peace having jurisdiction in the place where the matter requiring the cognizance of a justice arises:

"Justices" shall apply to England only, and shall mean two or more

Application of  
act.  
Definition of  
terms.—  
28 & 29 Vict.  
c. 126;  
23 & 24 Vict.  
c. 105.

29 & 30 Vict.  
c. 117.

*Reformatory  
Schools Act.*

justices in petty sessions, and shall include the lord mayor or an alderman of the city of London, or a police or stipendiary magistrate or other justice having by law authority to act alone for any purpose with the powers of two justices :

“ Magistrate ” shall apply to Scotland only, and shall include sheriff, sheriff substitute, justice of the peace of a county, judge in a police-court, and provost or baillie of a city or burgh :

“ Prison authority ” shall in England mean the same persons as are defined to be prison authorities by “ The Prisons Act, 1865,” and in Scotland shall mean the administrators of a prison, as defined by “ The Prisons (Scotland) Administration Act, 1860 : ”

“ Visiting justice ” shall in Scotland mean the administrators of a prison, defined as aforesaid.

Offenders  
under sixteen  
years of age  
may be sent to  
certified  
reformatory  
schools.

14. Whenever any offender who, in the judgment of the court, justices, or magistrate before whom he is charged, is under the age of sixteen, is convicted, on an indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the court, justices, or magistrate may also sentence him to be sent, at the expiration of his period of imprisonment, to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years :

Provided always, that a youthful offender under the age of ten years shall not be so directed to be sent to a reformatory school unless he has been previously charged with some crime or offence punishable with penal servitude or imprisonment, or is sentenced in England by a judge of assize or court of general or quarter sessions, or in Scotland by a circuit court of justiciary or sheriff.

The particular school to which the youthful offender is to be sent may be named either at the time of his sentence being passed, or within seven days thereafter, by the court, justices, or magistrate who sentenced him, or in default thereof at any time before the expiration of his imprisonment by any visiting justice of the prison to which he is committed.

In choosing a certified reformatory school, the court, justices, magistrate, or visiting justice shall endeavour to ascertain the religious persuasion to which the youthful offender belongs, and, so far as is possible, a selection shall be made of a school conducted in accordance with the religious persuasion to which the youthful offender appears to the court, justices, magistrate, or visiting justice to belong, which persuasion shall be specified by the court, justices, magistrate, or visiting justice.

It shall be lawful, upon the representation of the parent, or in the case of an orphan then of the guardian or nearest adult relative, of any offender detained in any such school, for a minister of the religious persuasion of such offender, at certain fixed hours of the day, which shall be fixed by the Secretary of State for the purpose, to visit such school for the purpose of affording religious assistance to such offender, and also for the purpose of instructing such offender in the principles of his religion.

Removal of  
offender to  
certified  
reformatory  
school.

15. The gaoler of every prison having in his custody any youthful offender sentenced to be sent to a reformatory school shall at the appointed time deliver such offender into the custody of the superintendent or other person in charge of the school in which he is to be detained, together with the warrant or other document in pursuance of which the offender was imprisoned and is sent to such school.

The possession of the warrant or other document in pursuance of which

a youthful offender is sent to a certified reformatory school shall be a sufficient authority for his detention in such school. 29 & 30 VICT. c. 117.

16. The parent, step-parent, or guardian, or if there be no parent, step-parent, or guardian, then the god-parent or nearest adult relative of any youthful offender sent or about to be sent to a certified reformatory school which is not conducted in accordance with the religious persuasion to which the offender belongs, may apply to the court by whom such offender was sentenced to be sent to a reformatory school, or to the visiting justices of the prison to which he was committed by that court, or to the justices or magistrate by whom he was sentenced to be sent to a reformatory school (or justices or a magistrate having the like jurisdiction), to send or to remove such offender to a certified reformatory school conducted in accordance with the offender's religious persuasion, and the court, visiting justices, justices, or magistrate (as the case may be) shall, upon proof of such offender's religious persuasion, comply with the request of the applicant, provided,—

*Reformatory  
Schools Act.*

Power to parent, &c., to apply to remove offender to a school conducted in accordance with offender's religious persuasion.

First, that the application be made before the offender has been sent to a certified reformatory school, or within thirty days after his arrival at such a school :

Secondly, that the applicant show to the satisfaction of the court, visiting justices, justices, or magistrate that the managers of the school named by him are willing to receive the offender.

17. The Secretary of State may at any time order any offender to be discharged from a certified reformatory school, or to be removed from one certified reformatory school to another, but so that the whole period of detention of the offender in a reformatory school shall not be increased by such removal. Discharge or removal by order of Secretary of State.

The Secretary of State may also at any time, after having given ten days' notice to the managers, order a youthful offender under sentence of detention in a reformatory or industrial school established under any other act of Parliament, the general rules for the government whereof have been approved by the Secretary of State, to be discharged from such school, or to be removed therefrom to any certified reformatory school, and in case of removal the youthful offender shall after such removal be deemed to be subject in all respects to the provisions of this act, but so that the whole period of detention of the offender under his sentence shall not be increased by such removal.

## EXTRADITION TREATIES ACT AMENDMENT ACT.

29 & 30 VICT. CAP. 121.

*An Act for the Amendment of the Law relating to Treaties of Extradition.*  
—[10th August, 1866.]

WHEREAS difficulties have been experienced in carrying into execution treaties for the extradition of persons accused of crimes between Her Majesty and the sovereigns or governments of certain foreign states : and whereas the statutes now in force for this purpose have been found insufficient : and whereas it is expedient to amend the same, and to give

29 & 30 Vict.  
c. 121.

*Extradition  
Treaties Act  
Amendment  
Act.*

Warrants of  
arrest and  
copies of depo-  
sitions to be  
received in  
evidence if  
authenticated  
in manner  
specified by  
this act.

This act to be  
construed with  
8 & 9 Vict.  
c. 113, and  
14 & 15 Vict.  
c. 99.

Duration of  
act.

greater facilities than at present exist under the aforesaid statutes for the admission in evidence of judicial or official documents or copies of documents :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Sect. 1. That warrants of arrest and copies of depositions signed or taken by or before a judge or competent magistrate in any foreign state with which Her Majesty may have entered into, or may hereafter enter into, any treaty for the extradition of fugitive offenders or persons accused of crimes, shall henceforth be received in evidence if authenticated in the manner following, that is to say, if the warrant of arrest purports to be signed by a judge or other competent magistrate of the county in which the same shall have been issued, and if the copies of depositions purport to be certified under the hand of such judge or magistrate to be true copies of the original depositions, and if the signature of the judge or magistrate in each case shall be authenticated in the manner usual in the respective states or countries by the proper officer of the department of the minister of justice, and sealed with the official seal of such minister ; and all courts of justice and magistrates in Her Majesty's dominions shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

2. This act shall be construed with an act passed in the eighth and ninth years of the reign of Her Majesty, chapter one hundred and thirteen, intituled " An Act to facilitate the Admission in Evidence of official and other Documents," and also with an act passed in the fourteenth and fifteenth years of the reign of Her Majesty, chapter ninety-nine, intituled " An Act to amend the Law of Evidence."

3. The duration of this act shall be limited to the first day of September, one thousand eight hundred and sixty-seven.

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# STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1867.

## CRIMINAL LUNATICS ACT.

30 VICT. CAP. 12.

*An Act to amend the Law relating to Criminal Lunatics.—*  
[12th April, 1867.]

WHEREAS it is expedient to amend the law relating to criminal lunatics :  
Be it therefore enacted by the Queen's most excellent Majesty, by and  
with the advice and consent of the Lords spiritual and temporal, and  
Commons, in this present Parliament assembled, and by the authority of  
the same, as follows :

Sect. 1. This act may be cited for all purposes as "The Criminal Lunatics Act, 1867."

2. "Criminal lunatic" shall mean for the purpose of this act any of the persons following; that is to say, Definition of criminal lunatic.

(1.) Any person for whose safe custody during her pleasure Her Majesty is authorised to give order :

(2.) Any person whom one of Her Majesty's principle Secretaries of State is authorised by law to direct to be removed to a lunatic asylum under any act of Parliament :

(3.) Any person sentenced or ordered to be kept in penal servitude who may be shown to the satisfaction of the Secretary of State to be unfit from imbecility of mind for penal discipline.

3. This act shall not apply to Scotland or Ireland.

4. The enactments contained in the ninth and tenth sections of the act of the session of the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter seventy-five, relating to the following matters : Application of act.  
General appli-  
cation of ss. 9  
and 10 of  
22 & 24 Vict.  
c. 75.

(1.) To the power of the Secretary of State to permit a lunatic to be absent from the asylum on trial :

(2.) To the expenses of conveyance and maintenance of criminal lunatics : shall apply to a criminal lunatic in whatever asylum or place of confinement he may be, and to such asylum and place of confinement, so far as regards such lunatic, in the same manner as if such asylum or place of confinement were an asylum appropriated to criminal lunatics in pursuance of the last-mentioned act.

5. It shall be lawful for one of Her Majesty's principle Secretaries of State to discharge absolutely or conditionally any criminal lunatic. Power of Secretary of State to give conditional order of discharge.

Where any criminal lunatic has been discharged conditionally, if any of the conditions of such discharge are broken, the said Secretary of State may by warrant, to be executed by any constable or other peace officer to discharge.

30 VICT. c. 12. whom such warrant is delivered, direct such person to be taken into custody, and to be conveyed to the place in which he was detained at the time of his discharge, or to any other place to which he might have been removed if no order for his discharge had been given, and any person so taken into custody shall revert in all respects to the same position as he was in at the time when the order of discharge was given, and shall be subject to be detained accordingly.

*Criminal  
Lunatics Act.*

Criminal  
lunatic may be  
removed to a  
county asylum  
on expiration  
of his sentence.

6. The eighth section of the said act of the session of the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter seventy-five, shall be repealed, and in place thereof be it enacted: Where the term of punishment awarded to any criminal lunatic confined in any asylum or other place of confinement for criminal lunatics expires before such evidence of his sanity has been given as justifies his being discharged, the following consequences shall ensue; that is to say,

- (1.) If such lunatic be confined in any asylum or place of confinement to which lunatics may be sent in pursuance of the Lunatic Asylums Act, 1853, he shall thenceforth be deemed to be a pauper lunatic, and shall be in the same position in all respects as if he were a lunatic who, immediately previous to the expiration of his term of punishment, had been found wandering at large within the parish or place where the offence was committed in respect of which he became a criminal lunatic, and had been directed by a justice, in pursuance of the sixty-eighth section of the Lunatic Asylums Act, 1853, to be received into the said asylum or place of confinement as a lunatic wandering at large, and a proper person to be taken charge of and detained under care and treatment:
- (2.) If such lunatic be confined in any asylum or place of confinement to which lunatics cannot be sent in pursuance of the said Lunatic Asylums Act, 1853, the said Secretary of State may, by order under his hand, direct the lunatic to be received into any asylum or place of confinement for lunatics into which a justice might have directed him to be received in pursuance of the said sixty-eighth section of the Lunatic Asylums Act, 1853, if immediately previous to the date of the expiration of his term of punishment the lunatic had been found wandering at large within the parish or place where the offence was committed in respect of which he became a criminal lunatic, and the justice had been satisfied that the lunatic was a proper person to be taken charge of and detained under care and treatment; and any order made by the said Secretary of State in pursuance of this section shall have the same effect, and be obeyed by the same persons, and subject them to the same penalties in case of disobedience, as an order made by a justice for the reception of a lunatic into an asylum or other place of confinement for lunatics in pursuance of the said sixty-eighth section of the said Lunatic Asylums Act, 1853; and such lunatic when received into the said asylum or place of confinement shall thenceforth be deemed to be a pauper lunatic, and shall be in the same position in all respects as if he had been such wandering lunatic as aforesaid directed to be received into the said asylum or place of confinement in pursuance of the said order of a justice.



## CRIMINAL LAW ACT.

30 &amp; 31 VICT. CAP. 35.

*An Act to remove some Defects in the Administration of the Criminal Law.*  
—[20th June, 1867.]

WHEREAS it is found that delay and inconvenience are frequently caused by the provisions contained in the first section of the act twenty-second and twenty-third Victoria, chapter seventeen, in cases not within the mischief for remedy whereof the same act was made and passed, and it is expedient to restrict the operation thereof: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same :

Sect. 1. That the said provisions of the said first section of the said act shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred.

Limitation of  
22 & 23 Vict.  
c. 17.

2. Whenever any bill of indictment shall be preferred to any grand jury, under the provisions of the act twenty-second and twenty-third Victoria, chapter seventeen, against any person who has not been committed to or detained in custody, or bound by recognisance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges, and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges, and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster, or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that court), to issue against the person on whom such order is made such and the like writ or writs, process or processes, as may be lawfully issued by any of the said superior courts for enforcing judgments thereof.

On acquittal,  
&c., of person  
indicted, who  
has not been  
committed or  
held to bail,  
court may  
order prosecu-  
tor to pay  
costs to  
accused if it  
think the  
prosecution  
unreasonable.

3. And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf, and that injustice is thereby

Accused  
person to  
asked by

30 & 31 Vict.  
c. 35.

*Criminal Law  
Act.*

justice if he  
desire to call  
witnesses—  
their deposi-  
tions to be  
taken and  
returned to  
court of trial  
if accused  
person call  
any.

occasioned to them; and it is expedient to remove, as far as practicable, all just ground for such complaint: Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person for trial or admit him to bail, shall, immediately after obeying the directions of the eighteenth section of the act eleventh and twelfth Victoria, chapter forty-two, demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case or tending to prove the innocence of the accused person, shall be bound by recognisance to appear and give evidence at the said trial; and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.

Provisions of  
11 & 12 Vict.  
c. 42, extended  
to this act.

4. All the provisions of the said act eleventh and twelfth Victoria, chapter forty-two, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognisance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this act.

If witnesses  
for accused,  
bound by  
recognisance,  
appear at the  
trial, court  
may allow  
expenses.

5. The court before which any accused person shall be prosecuted or tried, or for trial, before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorised and empowered, in its discretion, at the request of any person who shall appear before such court on recognisance to give evidence on behalf of the person accused, to order payment unto such witness so appearing such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble, and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court; and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of sixpence for each witness, make out and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of sixpence, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the

expenses of the prosecutor or witnesses against such accused person ; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough, or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts : Provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution ; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution.

80 & 81 Vic  
c. 35.

*Criminal Law  
Act.*

6. And whereas by the seventeenth section of the act eleventh and twelfth Victoria, chapter forty-two, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said act of a witness who is dead, or so ill as to be unable to travel : and whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said act, the examination of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interest of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same : therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed ; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record ; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved

Power to take  
deposition of  
person dan-  
gerously ill,  
and not likely  
to recover, and  
to make same  
evidence in  
certain events,  
after death of  
such person.

30 & 31 VICT.  
c. 35.

*Criminal Law  
Act.*

Provision for  
the prisoner  
being present  
at taking of  
statement.

Provisions of  
24 & 25 Vict.  
c. 66, as to  
witnesses who  
object to be  
sworn, ex-  
tended to  
jurors.

Money found  
on prisoner to  
be given to  
purchaser of  
property not  
known to be  
stolen, on  
restitution of  
property.

Governor of  
prison to bring  
up the body of  
any person  
indicted, with-  
out writ of  
Habeas  
Corpus, under  
order of court.

to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had, or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

7. Whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as herein-before mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed.

8. And whereas relief has been given by the statute twenty-fourth and twenty-fifth Victoria, chapter sixty-six, to persons refusing, from alleged conscientious motives, to be sworn as witnesses in criminal proceedings, and it is expedient to extend that relief to persons required to serve as jurors; Therefore if any person summoned or required to serve as a juror in any civil or criminal proceeding shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to administer an oath to a juror, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following:

"I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c.

Which solemn affirmation and declaration shall be of the same force and effect, and if untrue shall entail all the same consequences, as if such person had taken an oath in the usual form; and whenever in any legal proceedings it is necessary or usual to state or allege that jurors have been sworn, it shall not be necessary to specify that any particular juror has made affirmation or declaration instead of oath, but it shall be sufficient to state or allege that the jurors have been "sworn or affirmed."

9. Where any prisoner shall be convicted, either summarily or otherwise, of larceny or other offence, which includes the stealing of any property, and it shall appear to the court by the evidence that the prisoner has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the prisoner on his apprehension, it shall be lawful for the court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order that out of such moneys a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser.

10. Where recognisances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such

person in order that he may be arraigned upon such indictment without writ of Habeas Corpus, and the said governor shall thereupon obey such order. 80 & 81 Vict. c. 85.

11. This act shall not extend to Ireland.

12. This act shall come into operation on the first day of October, one thousand eight hundred and sixty-seven.

*Criminal Law Act.*

Extent of act.  
Commence-  
ment of act.

## NAVAL STORES ACT.

30 & 31 VICT. CAP. 119.

*An Act for the Protection of Naval Stores.*—[20th August, 1867.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Sect. 1. This act may be cited as " The Naval Stores Act, 1867."

2. This act shall not extend to Scotland or Ireland.

3. In this act—

The term " the Admiralty " means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the Office of Lord High Admiral.

The term " dealer in marine stores " means a person bound to conform to the regulations of the Merchant Shipping Act, 1854, section four hundred and eighty :

The term " dealer in old metals " has the same meaning as in the Old Metal Dealers Act, 1861 :

The term " stores " includes all goods and chattels and any single store or article.

4. The Naval and Victualling Stores Act, 1864, is hereby repealed ; but this repeal or anything in this act shall not apply to or in respect of any offence, act, or thing committed or done before the passing of this act, save that this act shall apply to stores bearing any such mark or part of a mark as in this act mentioned, whether applied before or after the passing of this act.

5. The marks described in the schedule to this act may be applied in or on stores therein described in order to denote Her Majesty's property in stores so marked.

It shall be lawful for the Admiralty, their contractors, officers, and workmen, to apply those marks or any of them in or on any such stores.

If any person, without lawful authority (proof of which authority shall lie on the party accused), applies any of those marks in or on any such stores, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

6. If any person, with intent to conceal Her Majesty's property in any stores, takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, he shall be guilty of felony, and shall, on conviction thereof, be liable, in the discretion of the court before which he is convicted, to be

Short title.

Extent of act.

Interpretation  
of terms—

17 & 18 Vict.  
c. 104, s. 480  
—24 & 25

Vict. c. 110.

27 & 28 Vict.  
c. 91, repealed,  
but not to  
apply to  
offences before  
passing this  
act.

Marks in  
schedule  
appropriated  
for naval  
stores.

Obliteration,  
with intent to  
conceal, &c.,  
felony.



- 80 & 81 Vict.  
c. 119.  
—  
*Naval Stores  
Act.*  
—  
Knowingly  
receiving, &c.,  
marked  
stores a  
misdemeanor.
- kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.
7. If any person, without lawful authority (proof of which authority shall lie on the party accused), receives, possesses, keeps, sells, or delivers any stores bearing any such mark as aforesaid, or any part of any such mark, knowing them to bear such mark or part of a mark, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding one year, with or without hard labour.
- Knowledge of  
stores being  
marked pre-  
sumed against  
dealers, &c.
8. Where the person charged with such a misdemeanor as last aforesaid was at the time at which the offence is charged to have been committed in Her Majesty's service, or in the service of the Admiralty, or a dealer in marine stores or in old metals, or a pawnbroker, knowledge on his part that the stores to which the charge relates bore such a mark or part of a mark as aforesaid shall be presumed until the contrary is shown.
- Summary  
conviction in  
certain cases.
9. A person charged with such a misdemeanor as last aforesaid in relation to stores the value whereof does not exceed five pounds shall be liable, on summary conviction before a justice of the peace, to a penalty not exceeding twenty pounds, or, in the discretion of the justice, to be imprisoned for any term not exceeding six months, with or without hard labour.
- Penalty on  
dealer, &c.,  
found in  
possession of  
unmarked  
stores, and not  
accounting.
10. If stores are found in the possession of a person being in Her Majesty's service or in the service of the Admiralty, or being a dealer in marine stores or in old metals, or a pawnbroker, and he is taken or summoned before a justice of the peace, and such stores do not bear any such mark or part of a mark as aforesaid, but the justice sees reasonable grounds for believing them to be or to have been Her Majesty's property, then if such person does not satisfy the justice that he came by the stores so found lawfully, he shall be liable, on summary conviction before the justice, to a penalty not exceeding five pounds.
- Effect of con-  
viction of  
dealer in old  
metals.  
Persons not  
dealers in  
marine stores,  
&c., found in  
possession and  
not satisfac-  
torily account-  
ing for them,  
liable to a  
penalty.
11. A conviction under this act of a dealer in old metals shall, for the purposes of registration and its consequences under the Old Metal Dealers Act, 1861, be equivalent to a conviction under that act.
12. In order to prevent a failure of justice in some cases by reason of the difficulty of proving knowledge of the fact that stores bore such a mark as aforesaid,—
- If stores bearing such a mark or part of a mark are found in the possession of a person not being in Her Majesty's service or in the service of the Admiralty, and not being a dealer in marine stores or in old metals, or a pawnbroker, the following provisions shall have effect:—
- (1.) If such person, when taken or summoned before a justice of the peace, does not satisfy the justice that he came by the stores so found lawfully, he shall be liable, on conviction by the justice, to a penalty not exceeding five pounds.
- (2.) If he satisfies the justice that he came by the stores so found lawfully, the justice, at his discretion, as the evidence given and the circumstances of the case require, may summon before him every person through whose hand such stores appear to have passed, and if any such person as last aforesaid who has had possession thereof does not satisfy the justice that he came by the same lawfully, he shall be liable, on summary conviction before the justice, to a penalty not exceeding five pounds.



13. For the purposes of this act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or inclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit or for the use or benefit of another.

30 & 31 Vict.  
c. 119.

*Naval Stores  
Act.*

14. A constable of the Metropolitan Police Force may, within the yard and limits for which he is sworn, stop, search, and detain any vessel, boat, or carriage in or on which there is reason to suspect that any of Her Majesty's stores stolen or unlawfully obtained may be found, or any person reasonably suspected of then and there having in his possession any such stores stolen or unlawfully obtained.

Criminal  
possession  
of stores  
explained for  
purposes  
of act.  
Policeman of  
Metropolitan  
Force may  
stop suspected  
persons, &c.

15. The following sections of the act of the session of the twenty-fourth and twenty-fifth years of Her Majesty's reign (chapter ninety-six), "to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences," shall be incorporated with this act, and shall for the purposes of this act be read as if they were here re-enacted, namely, sections ninety-eight to one hundred, one hundred and three, one hundred and seven to one hundred and thirteen, and one hundred and fifteen to one hundred and twenty-one, all inclusive; and for this purpose the expression "this act," when used in the sections herein incorporated, shall be taken to include the present act.

Sections 98,  
99, 100, 103,  
107 to 113,  
and 115 to  
121, of 24 &  
25 Vict. c. 96,  
incorporated  
with this act.

16. It shall not be lawful for any person, without permission in writing from the Admiralty, or from some person authorised by the Admiralty in that behalf (proof of which permission shall lie on the party accused), to gather or search for stores, or to creep, sweep, or dredge in the sea or any tidal water, within one hundred yards from any vessel belonging to Her Majesty or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any moorings belonging to Her Majesty, or from any of Her Majesty's wharves, or dock, victualling, or steam factory yards, or in or on any part of the spaces or distances from time to time marked out as ranges for artillery practice for the use of Her Majesty's ships at Portsmouth, Devonport, or elsewhere, whether covered with water or not.

Prohibition of  
sweeping, &c.,  
within 100  
yards of dock-  
yards, &c.—  
Penalty.

If any person acts in contravention of this provision he shall be liable on summary conviction before a justice of the peace, to a penalty not exceeding five pounds, or to be imprisoned for any term not exceeding three months, with or without hard labour.

17. Notwithstanding anything in any act relating to municipal corporations or to the Metropolitan Police Force or in any other act, any pecuniary penalty or other money recovered under this act shall be paid or applied as the Admiralty direct.

Penalties, &c.,  
to be applied  
under orders  
of Admiralty.

18. Nothing in this act shall prevent any person from being indicted under this act or otherwise for any indictable offence made punishable on summary conviction by this act, or prevent any person from being liable under any other act or otherwise to any other or higher penalty or punishment than is provided for any offence by this act, so that no person be punished twice for the same offence.

Not to prevent  
persons being  
indicted under  
this act, &c.

19. Section forty-five of the Greenwich Hospital Act, 1865, shall be read and have effect as if this act instead of the Naval and Victualling Stores Act, 1864, were referred to in that section.

Amendment of  
sect. 45 of  
28 & 29 Vict.  
c. 89.

20. The repeal by the Admiralty Acts Repeal Act, 1865, of sections one, two, four, five, and eight of the act of the session of the ninth and tenth years of the reign of King William the Third (chapter forty-one),

Amendment of  
28 & 29 Vict.  
c. 112, as to

80 & 31 Vict.  
c. 119.  
*Naval Stores  
Act.*  
—  
repeal of  
certain  
sections of  
9 & 10 Will. 3,  
c. 41.

“for the better preventing the Embezzlement of His Majesty’s Stores of War, and preventing Cheats, Frauds, and Abuses in paying Seamen’s Wages,” is hereby repealed as far as those sections relate to any stores except naval or victualling stores, or other stores belonging to or under the charge or control of the Admiralty, or to Scotland or Ireland, and to that extent those sections are hereby revived; but nothing herein contained shall interfere with the operation of any other act of the present session.

SCHEDULE.

Marks appropriated for Her Majesty’s Use in or on Stores.

| Stores.  | Marks.  |
|--|---|
| Hempen cordage and wire rope .....                     | White, black. or coloured worsted threads laid up with the yarns and the wire respectively. |
| Canvas, fearnought, hammocks, and seamen’s bags.       | A blue line in a serpentine form.   |
| Buntin .....   | A double tape in the warp.  |
| Candles .....  | Blue or red cotton threads in each wick, or wicks of red cotton.                            |
| Timber, metal. and other stores not before enumerated. | The broad arrow.  |

MERCHANT SHIPPING ACT.

80 & 31 VIOT. CAP. 124.

*An Act to amend the Merchant Shipping Act, 1854.—[20th August, 1867.]*

Offences by  
British  
subjects on  
board ships.

Sect. 11. If any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty’s dominions, which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid.

# STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1868.

## DOCUMENTARY EVIDENCE ACT.

31 & 32 VICT. CAP. 37.

*An Act to amend the Law relating to Documentary Evidence in certain Cases.*—[25th June, 1868.]

WHEREAS it is expedient to amend the law relating to evidence: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. This act may be cited for all purposes as "The Documentary Short title Evidence Act, 1868."

2. *Prima facie* evidence of any proclamation, order, or regulation issued before or after the passing of this act by Her Majesty or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(1.) By the production of a copy of the *Gazette* purporting to contain such proclamation, order, or regulation.

(2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council of a copy or extract purporting to be certified to be true by the clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing.

|   |  |
|---|--|
| 81 & 82 Vict.<br>c. 87.                                   | No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order, or regulation.   |
| <i>Documentary Evidence Act.</i>                          | 3. Subject to any law that may be from time to time made by the legislature of any British colony or possession, this act shall be in force in every such colony and possession.   |
| Act to be in force in colonies.<br>Punishment of forgery. | 4. If any person commits any of the offences following; that is to say,<br>(1.) Prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or to be printed under the authority of the legislature of any British colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or,<br>(2.) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this act authorised to be annexed to a copy of or extract from any proclamation, order, or regulation;<br>he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude for such term as is prescribed by "The Penal Servitude Act, 1864," as the least term to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour. |
| Definition of terms:                                      | 5. The following words shall in this act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; (that is to say,)   |
| "British colony and possession;"                          | "British colony and possession" shall for the purposes of this act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty by virtue of any act of Parliament for the Government of India and all other Her Majesty's dominions.   |
| "Legislature;"  | "Legislature" shall signify any authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any colony or possession.  |
| "Privy Council;"  | "Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto.   |
| "Government printer;"                                     | "Government printer" shall mean and include the printer to Her Majesty and any printer purporting to be the printer authorised to print the statutes, ordinances, acts of state, or other public acts of the legislature of any British colony or possession or otherwise to be the Government printer of such colony or possession.   |
| "Gazette."  | "Gazette" shall include the <i>London Gazette</i> , the <i>Edinburgh Gazette</i> , and the <i>Dublin Gazette</i> , or any of such <i>Gazettes</i> .  |
| Act to be cumulative.                                     | 6. The provisions of this act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.   |

81 & 82 Vict.  
c. 87.

Documentary  
Evidence Act.

SCHEDULE.

| Column 1.<br>Name of Department or Officer.                      | Column 2.<br>Names of Certifying Officers.   |
|--|--|
| The Commissioners of the Treasury.                               | Any Commissioner, Secretary, or Assistant-secretary of the Treasury.   |
| The Commissioners for executing the Office of Lord High Admiral. | Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners. |
| Secretaries of State.  | Any Secretary or Under-Secretary of State.   |
| Committee of Privy Council for Trade.                            | Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant-secretary of the said Committee.          |
| The Poor Law Board.  | Any Commissioner of the Poor Law Board or any Secretary or Assistant-secretary of the said Board.                              |

LARCENY AND EMBEZZLEMENT ACT.

81 & 82 VICT. CAP. 116.

*An Act to amend the Law relating to Larceny and Embezzlement.—*  
[31st July, 1868.]

WHEREAS it is expedient to provide for the better security of the property of co-partnerships and other joint beneficial owners against offences by part owners thereof, and further to amend the law relating to embezzlement: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

Sect. 1. If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, partnership notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such co-partnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners.

Member of co-  
guilty of con-  
verting to his  
own use, &c.  
property of co-  
partnership  
liable to be  
tried as if not  
such member.

31 & 32 Vict.  
c. 116.

*Larceny Act.*

Provisions of  
18 & 19 Vict.  
c. 126, ex-  
tended to  
embezzlement  
by clerks or  
servants.  
Extent of act.

2. All the provisions of the act passed in the session of Parliament held in the eighteenth and nineteenth years of Her present Majesty's reign, intituled "An Act for diminishing Expense and Delay in the Administration of Criminal Justice in certain Cases," shall extend and be applicable to the offence of embezzlement by clerks or servants, or persons employed for the purpose or in the capacity of clerks or servants, and the said act shall henceforth be read as if the said offence of embezzlement had been included therein.

3. This act shall not extend to Scotland.

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# STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1869.

## NAVAL STORES ACT.

32 VICT. CAP. 12.

*An Act for the Protection of Naval Stores.*—[18th May, 1869.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Sect. 1. This act may be cited as "The Naval Stores Act, 1869."

Short title.

2. In this act—

Interpretation  
of terms.

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral:

The term "stores" includes all goods and chattels, and any single store or article.

3. The "Naval Stores Act, 1867," is hereby repealed; but this repeal shall not apply or have effect to or in respect of any offence, act, or thing committed or done before the passing of this act, or affect the revivor of any enactment revived by the act hereby repealed.

30 & 31 Vict.  
c.119, repealed,  
but not to  
revive certain  
enactments.

4. The marks described in the schedule to this act may be applied in or on stores therein described in order to denote Her Majesty's property in stores so marked; and it shall be lawful for the Admiralty, their contractors, officers, and workmen, to apply those marks, or any of them, in or on any such stores; and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores he shall be guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Marks in  
schedule  
appropriated  
for naval  
stores.

5. If any person with intent to conceal Her Majesty's property in any stores takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, he shall be guilty of felony, and shall on conviction thereof be liable in the discretion of the court before which he is convicted to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Obliteration  
with intent to  
conceal.

6. A constable of the metropolitan police force may, within any of Her Majesty's dock, victualling, or steam factory yards, and the area connected therewith, for which he is sworn, stop, search, and detain any vessel, boat, or vehicle in or on which there is reason to suspect that any of Her Majesty's stores stolen or unlawfully obtained may be found, or any person

Power for  
policemen of  
metropolitan  
force to stop  
suspected  
persons, &c.,

82 Vict. c. 12. reasonably suspected of having or conveying in any manner any of Her Majesty's stores stolen or unlawfully obtained; and if any person is brought before two justices of the peace charged with having or conveying in any manner any of Her Majesty's stores reasonably suspected of being stolen or unlawfully obtained, and does not give an account to the satisfaction of the justices how he came by the same, he shall be deemed guilty of a misdemeanor, and shall be liable, on summary conviction before two justices, to a penalty not exceeding five pounds, or, in the discretion of the justices, to be imprisoned for any term not exceeding two months, with or without hard labour.

*Naval Stores Act.*

and punish-  
ment for  
possession, &c.

Prohibition of  
sweeping, &c.,  
within 100  
yards of  
dockyards.

7. It shall not be lawful for any person, without permission in writing from the Admiralty, or from some person authorised by the Admiralty in that behalf (proof of which permission shall lie on the party accused), to gather or search for stores, or to creep, sweep, or dredge in the sea or any tidal water, within one hundred yards from any vessel belonging to Her Majesty or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any moorings belonging to Her Majesty, or from any of Her Majesty's wharves, or dock, victualling, or steam factory yards, or in or on any part of the spaces or distances from time to time marked out as ranges for artillery practice for the use of Her Majesty's ships at Portsmouth, Devonport, or elsewhere, whether covered with water or not.

If any person acts in contravention of this provision he shall be liable, on summary conviction before a justice of the peace, to a penalty not exceeding five pounds, or, in the discretion of the justice, to be imprisoned for any term not exceeding three months, with or without hard labour.

Penalty on  
dealer, &c.,  
found in  
possession of  
stores, and not  
accounting for  
them.

8. If stores are found in the possession or keeping of a person being in Her Majesty's service, or in the service of the Admiralty, or being a dealer in marine stores or in old metals, or a pawnbroker (within the meaning of any enactments for the time being in force relating to such dealers or to pawnbrokers), and he is taken or summoned before a justice of the peace, and the justice sees reasonable grounds for believing the stores found to be or to have been Her Majesty's property, then if such person does not satisfy the justice that he came lawfully by the stores found, he shall be liable, on summary conviction before a justice, to a penalty not exceeding five pound; and for the purposes of this section stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or enclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit or for the use or benefit of another.

Conviction of  
dealer in old  
metals—  
24 & 25 Vict.  
c. 110.

9. A conviction under any provision of this act of a dealer in old metals shall, for the purposes of registration and its consequences under "The Old Metal Dealers Act, 1861," be equivalent to a conviction under that act.

Parts of  
24 & 25 Vict.  
c. 96 incor-  
porated.

10. The following sections of the act of the session of the twenty-fourth and twenty-fifth years of Her Majesty's reign (chapter ninety-six), "to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences," are hereby incorporated with this act, and shall for the purposes of this act be read as if they were here re-enacted, namely, sections ninety-eight to one hundred, one hundred and three, one hundred and seven to one hundred and thirteen, and one hundred and fifteen to one hundred and twenty-one, all inclusive; and for

this purpose the expression "this act," where used in those sections, shall be taken to include the present act. 82 VICT. c 12.

11. Notwithstanding anything in any act relating to municipal corporations or to the metropolitan police force, or in any other act, any pecuniary penalty or other money recovered under this act shall be paid and applied under such regulations as the Admiralty, with the concurrence of the Treasury, may from time to time make. *Naval Stores Act.* Penalties, &c. to be applied under orders of Admiralty.

12. Nothing in this act shall prevent any person from being indicted under this act or otherwise for any indictable offence made punishable on summary conviction by this act, or prevent any person from being liable under any other act or otherwise to any other or higher penalty or punishment than is provided for any offence by this act, so that no person be punished twice for the same offence. Not to prevent persons being indicted under this act, &c.

13. Section forty-five of "The Greenwich Hospital Act, 1865," shall be read and have effect as if this act, instead of "The Naval and Victualling Stores Act, 1864," were referred to in that section. Amendment of sect. 45 of 28 & 29 Vict. c. 89.

14. This act shall not extend to Scotland or Ireland. Extent of act.

SCHEDULE.

*Marks appropriated for Her Majesty's use in or on Stores.*

| Stores.  | Marks.  |
|--|---|
| Hempen cordage and wire rope .....                     | White, black, or coloured worsted threads laid up with the yarns and the wire respectively. |
| Canvas, fearnought, hammocks and seamen's bags.        | A blue line in a serpentine form.   |
| Buntin .....   | A double tape in the warp.  |
| Candles .....  | Blue or red cotton threads in each wick or wicks of red cotton.                             |
| Timber, metal, and other stores not before enumerated. | The broad arrow.  |

TRADES UNIONS FUNDS PROTECTION ACT.

82 & 33 VICT. CAP. 61.

*An Act to protect the Funds of Trades Unions from Embezzlement and Misappropriation.—9th August, 1869.]*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

|   |   |
|---|---|
| 32 & 33 Vict.<br>c. 61.   | Sect. 1. An association of persons having rules, agreements, or practices among themselves as to the terms on which they or any of them will or will not consent to employ or to be employed shall not, by reason only that any of such rules, agreements, or practices may operate in restraint of trade, or that such association is partly for objects other than the objects mentioned in the "Friendly Societies Act," be deemed, for the purposes of the twenty-fourth section of the "Friendly Societies Act, 1855," for the punishment of frauds and impositions, to be a society established for a purpose which is illegal, or not to be a friendly society within the meaning of the forty-fourth section of the said act. |
| <i>Trades Unions Act.</i>   |   |
| Provisions of the<br>18 & 19 Vict.<br>c. 63 to apply to certain associations. |   |
| Duration of act.  | 2. This act shall not continue in force after the last day of August, one thousand eight hundred and seventy.   |
| Short title.  | 3. This act may be cited as "The Trades Unions Funds Protection Act."   |

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### DEBTORS ACT.

32 & 33 VICT. CAP. 62.

*An Act for the Abolition of Imprisonment for Debt, for the Punishment of fraudulent Debtors; and for other purposes.—[9th August, 1869.]*

|                                   |   |
|-----------------------------------|---|
| Punishment of fraudulent debtors. | <p>Sect. 11. Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of "The Bankruptcy Act, 1869," shall, in each of the cases following, be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say,</p> <ol style="list-style-type: none"> <li>(1.) If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud:</li> <li>(2.) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:</li> <li>(3.) If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody, or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:</li> <li>(4.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:</li> <li>(5.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next</li> </ol> |
|-----------------------------------|---|

before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards :

82 & 88 Vict.  
c. 62.

*Debtors Act.*

- (6.) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud :
- (7.) If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof :
- (8.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :
- (9.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :
- (10.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :
- (11.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs :
- (12.) If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses :
- (13.) If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same :
- (14.) If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud :
- (15.) If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on

32 & 38 Vict.  
c. 62.

*Debtors Act.*

credit and has not paid for, unless the jury is satisfied that he had no intent to defraud :

(16.) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy or liquidation.

Penalty for  
absconding  
with property.

12. If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour.

Penalty on  
fraudulently  
obtaining  
credit, &c.

13. Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour ; that is to say,

(1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud :

(2.) If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property :

(3.) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him :

False claim,  
&c., a mis-  
demeanor.

14. If any creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of "The Bankruptcy Act, 1869," wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour.

Debts  
incurred by  
fraud.

15. Where a debtor makes any arrangement or composition with his creditors under the provisions of "The Bankruptcy Act, 1869," he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends.

Order by  
court for  
prosecution  
on report of  
trustee.

16. Where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence.

Expenses of  
prosecutions.

17. Where the prosecution of the bankrupt under this act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne as expenses of prosecutions for felony are allowed, paid, and borne.



18. Every misdemeanor under the second part of this act shall be deemed to be an offence within and subject to the provisions of the act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent Vexatious Indictments for certain Misdemeanors;" and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent.

32 & 33 VICT.  
c. 62.

*Debtors Act.*

Application of  
Vexatious  
Indictments  
Act to offences  
under this act.

19. In an indictment for an offence under this act it shall be sufficient to set forth the substance of the offence charged, in the words of this act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under "The Bankruptcy Act, 1869."

Form of  
indictment.

20. So much of the act of the session of the fifth and sixth years of Her Majesty's reign (chapter thirty-eight), "to define the jurisdiction of justices in general and quarter sessions of the peace," as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this act; and any offence under this act shall be deemed to be within the jurisdiction of such justices and recorders.

Quarter  
sessions to  
have jurisdic-  
tion in respect  
of offences  
under act.

21. The provisions of the act of the session of the fifth and sixth years of William the Fourth, chapter seventy-six, for the regulation of municipal corporations, sections fifty-two and fifty-three, as to the disqualification of mayors, aldermen, and town councillors having been declared bankrupt or having compounded by deed with their creditors, shall extend to every arrangement or composition by a mayor, alderman, or town councillor with his creditors under "The Bankruptcy Act, 1869," whether the same is made by deed or otherwise.

Mayors, &c.,  
disqualified by  
arrangements.

22. If any person being assigned by Her Majesty's commission to act as a justice of the peace is adjudged bankrupt, or makes any arrangement or composition with his creditors under "The Bankruptcy Act, 1869," he shall be and remain incapable of acting as a justice of the peace until he has been newly assigned by Her Majesty in that behalf.

Justices of the  
peace  
becoming  
bankrupt or  
arranging  
with creditors.

23. Where any person is liable under any other act of Parliament or at common law to any punishment or penalty for any offence made punishable by this act, such person may be proceeded against under such other act of Parliament or at common law or under this act, so that he be not punished twice for the same offence.

Punishments  
under this act  
cumulative.

## EVIDENCE FURTHER AMENDMENT ACT.

32 & 33 VICT. CAP. 68.

*An Act for the further Amendment of the Law of Evidence.—*  
[9th August, 1869.]

Sect. 4. If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if

Persons  
objecting to  
take oath may

32 & 33 Vict.  
c. 69.

*Evidence  
Further  
Amendment  
Act.*

be allowed to  
make declara-  
tion, and be  
triable for  
perjury.

the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration :

“ I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.”

And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath.

### CRIMINAL LUNATICS ACT.

32 & 33 VICT. CAP. 78.

*An Act to amend the Law relating to Criminal Lunatics.—  
[9th August, 1869.]*

WHEREAS by the sixth section of “The Criminal Lunatics Act, 1867,” it is enacted, “that where the term of punishment awarded to any criminal lunatic confined in any asylum or other place of confinement for criminal lunatics expires before such evidence of his sanity has been given as justifies his being discharged, such consequences shall ensue as are therein-after mentioned:” And whereas doubts are entertained whether such section extends to criminal lunatics whose terms of punishment have expired previously to the passing of the said act, and it is expedient to remove such doubts :

Be it enacted by the Queens most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

*Preliminary,*

Short title.  
Application of  
sect. 6 of  
30 & 31 Vict.  
c. 12.

Sect. 1. This act may be cited as “The Criminal Lunatics Act, 1869.”

2. It is hereby declared that the sixth section of “The Criminal Lunatics Act, 1867,” does apply and shall be deemed to have applied from the date of the passing thereof to criminal lunatics whose terms of punishment expired before the date of the passing of such act in the same manner, so far as circumstances admit, as if their terms of punishment had expired subsequently to the passing of such act, and all orders made and acts done previously to the passing of this act in respect of or to criminal lunatics whose terms of punishment expired before the passing of the said “Criminal Lunatics Act, 1867,” shall be valid accordingly, but no parish or place upon which any order may have been or shall be made for, or which shall be otherwise chargeable with, the maintenance of any criminal lunatic under the sixth section of the said act shall be liable to make good or refund any sum of money which may have been theretofore expended by any other parish or place on account of the maintenance of such lunatic.

## CLERKS OF ASSIZE ACT.

32 &amp; 33 VICT. CAP. 89.

*An Act to amend the Law relating to the Office of Clerk of Assize and Offices united thereto, and to certain Fees upon Orders for Payment of Witnesses in Criminal Proceedings.—[9th August, 1869.]*

WHEREAS it is expedient to amend the law relating to the office of clerk of assize and offices united thereto, and to remove doubts which have arisen respecting the taking of certain fees in pursuance of section five of the act of the session of the thirtieth and thirty-first years of the reign of Her present Majesty, chapter thirty-five, "to remove some Defects in the Administration of the Criminal Law:"

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

*Preliminary.*

Sect. 1. This act may be cited as "The Clerks of Assize, &c., Act, Short title. 1869."

2. This act shall not extend to Scotland or Ireland.

Extent of act.

## PART I.

## OFFICE OF CLERK OF ASSIZE.

3. After the passing of this act a person shall not be appointed to be clerk of assize unless he has during a period of not less than three years been either, Qualification for clerk of assize.

- (1.) A barrister-at-law in actual practice, or
- (2.) A special pleader or conveyancer in actual practice, or
- (3.) An attorney of one of the Superior Courts of law at Westminster in actual practice, or
- (4.) A subordinate officer of a clerk of assize on circuit ;

and the appointment of any person to be clerk of assize who is not qualified as provided by this section shall be void, and another duly qualified person may be appointed in his place as if he were naturally dead.

4. Whenever any vacancy takes place in the office of clerk of assize the Commissioners of Her Majesty's Treasury may revise the salary attached to such office and fix another salary in lieu of the former salary, having regard to the nature of the duties and responsibility of such office. Revision of salary of clerk of assize.

5. A clerk of assize who is paid by salary shall not take any fee for his own use ; and if he is authorised by any act passed or hereafter to be passed to take any fee for any duty performed by him, he shall take (by stamps or otherwise) and account for and pay over such fee in such manner as may be directed by the Commissioners of Her Majesty's Treasury. Taking of fees by clerks of assize.

6. Every person who is appointed after the passing of this act to be clerk of assize shall hold his office subject to such provisions and regulations as may thereafter be enacted by Parliament respecting the same, and shall not be entitled to any compensation in respect of the emoluments of his office in case any alteration is made in the duties thereof, or the same is abolished by authority of Parliament. Persons hereafter appointed not to be entitled to compensation.

32 & 33 VICT.  
c. 89.

*Clerks of  
Assize Act.*

Removal of  
person  
employed by  
clerk of assize.

Definition of  
clerk of assize.

Construction  
of part of act.

Amendment  
of sect. 5 of  
30 & 31 Vict.  
c. 35, as to  
fees.

Fees under  
sect. 5 of  
30 & 31 Vict.  
c. 35, to be  
included in the  
account of the  
clerk of the  
peace.

7. Any person employed by any clerk of assize and paid any salary or allowance out of moneys provided by Parliament shall not be removed from his office or employment without the sanction of the Commissioners of Her Majesty's Treasury.

8. In this act the term "clerk of assize" includes Clerk of the Crown and associate on circuit, and any other office the duties of which are at the passing of this act or may hereafter be performed by the clerk of assize.

## PART II.

### FEES ON ORDERS UNDER 30 & 31 VICT. c. 35, s. 5.

9. This part of this act shall be construed as one with the recited act of the thirtieth and thirty-first years of the reign of Her present Majesty, chapter thirty-five, which may be cited as "The Criminal Law Amendment Act, 1867."

10. Where the officer of the court who, in pursuance of section five of "The Criminal Law Amendment Act, 1867," makes out an order for the payment of expenses and compensation to witnesses is paid by salary, or is for the time being allowed under the table of fees relating to his office to take one fee only of fixed amount in respect of his several duties relating to the prosecution of an offender, such officer shall make out and deliver such order without taking any fee for the same, and the said section shall be construed as if all mention of the sum or fee of sixpence were omitted therefrom.

11. Where the fee of sixpence is in pursuance of section five of "The Criminal Law Amendment Act, 1867," as amended by this act, taken by a clerk of the peace or other officer, the amount of such fees received by him during any year after the passing of this act shall be included in the total amount of fees in criminal prosecutions received by him, which is to be ascertained under section eighteen of the act of the session of the eighteenth and nineteenth years of the reign of Her present Majesty, chapter one hundred and twenty-six, "for diminishing Expense and Delay in the Administration of Criminal Justice in certain Cases," and shall be included in every return or account of fees made or rendered by such clerk of the peace or other officer.

## HABITUAL CRIMINALS ACT.

32 & 33 VICT. CAP. 99.

*An Act for the more effectual Prevention of Crime.*—[9th August, 1869.]

WHEREAS it is expedient to make further provision for the suppression of crimes committed by convicts at large on licence or by other offenders :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

### *Preliminary.*

Short title.

Definition of  
terms.

Sect. 1. This act may be cited as "The Habitual Criminals Act, 1869."

2. In this act the term "court" includes any justice or justices of the peace or other person or persons having jurisdiction in the matter to

which the term refers. "Chief officer of police" shall mean within the district of the London metropolitan police force the Commissioner of Police, or an assistant commissioner, or a district superintendent; in the City of London the commissioner of police; within the police district of Dublin metropolis any one of the commissioners of police for the said district; and elsewhere shall include any of the following persons,—in England, any chief constable, head constable, or other chief officer of police or of a division of police, by whatever name such chief officer may be called; the expression "stipendiary magistrate" shall include a metropolitan police magistrate; and in Ireland, any inspector, sub-inspector, head or other constable of the Royal Irish Constabulary acting as chief officer of constabulary within any district or town. Where in any of the provisions of this act the expression "stipendiary magistrate" is used, such provision shall be interpreted in Scotland as if the expression "sheriff or sheriff substitute" had been used.

82 & 83 Vict.  
c. 99.

*Habitual  
Criminals Act.*

## PART I.

### CONVICTS AT LARGE ON LICENCE.

3. Any constable or police officer may, if authorised so to do in writing by a chief officer of police, without warrant, take into custody any convict who is the holder of a licence granted under "The Penal Servitude Acts, 1853, 1857, and 1864," or any of them, and whom he has reason to believe to be getting a livelihood by dishonest means, and may bring him before two or more justices of the peace or a stipendiary magistrate.

Power to  
apprehend  
holders of  
licence on  
suspicion.

If it shall appear from the facts proved before such justices or magistrate that there are reasonable grounds for such belief, his licence shall be forfeited in the same manner as if he had been convicted of an indictable offence, and the justices or magistrate before whom he is brought shall commit him to any prison within their or his jurisdiction, there to remain until he can conveniently be removed to some prison in which convicts under sentence of penal servitude may lawfully be confined, in order that he may there undergo the term of penal servitude to which he is liable under the said Penal Servitude Acts or some of them.

4. Where in any licence granted under the said Penal Servitude Acts, or any of them, any conditions different from or in addition to those contained in Schedule A. of "The Penal Servitude Act, 1864," are inserted, the holder of such licence shall, on a breach of such conditions, be deemed guilty of an offence, in the same manner as if such conditions were contained in the said Schedule A.

Penalty for  
breach of  
conditions of  
licence.

There shall be repealed so much of the fourth section of "The Penal Servitude Act, 1864," as requires the holder of a licence to report himself personally once in each month.

A copy of any conditions annexed to any licence granted under the Penal Servitude Acts, other than the conditions contained in Schedule A. of "The Penal Servitude Act, 1864," shall be laid before Parliament within twenty-one days after the making thereof, if Parliament be then sitting, or if not, then within fourteen days after the commencement of the next session of Parliament.

## PART II.

### REGISTRATION OF CRIMINALS.

5. For the better supervision of criminals a register of all persons convicted of crime in England shall be kept in London, under the manage-

Register of  
criminals.

32 & 33 Vict.  
c. 99.

*Habitual  
Criminals Act.*

Returns for  
purposes of  
register.

Part of act to  
be construed  
with Penal  
Servitude  
Acts.

Person twice  
guilty of  
felony and not  
punished with  
penal servi-  
tude to be  
subject to the  
supervision of  
the police.

ment of the Commissioner of Police for the Metropolis, or of such other person as one of Her Majesty's principal Secretaries of State may appoint, and in Dublin a like register shall be kept, under the management of the Commissioners of Police for the police district of Dublin metropolis, or of such other person as the Lord Lieutenant or other Chief Governor or Governors of Ireland may appoint, in such form, with such evidences of identity, and containing such particulars, and subject to such regulations as may from time to time be prescribed by one of Her Majesty's principal Secretaries of State in England, or in Ireland by the Lord Lieutenant. All expenses incurred with the sanction of the Commissioners of the Treasury in keeping such register shall be paid out of moneys provided by Parliament.

6. In order to make such register complete, and to make the supervision over criminals effectual, the gaolers or governors of county and borough prisons, and the chief officers of police in every county, borough, and other place in the United Kingdom which maintains a separate police, shall from time to time make returns, if such prison, county, borough, or other place be in Great Britain, to one of Her Majesty's principal Secretaries of State, and if the same be situate in Ireland to the Lord Lieutenant or other Chief Governor or Governors of Ireland, or to such person as they may respectively appoint, in such manner, and at such time, and containing such evidences of identity and other information with respect to persons convicted of crime, as they may from time to time respectively direct.

All expenses incurred in any place in carrying this section into effect with the sanction of the authority authorised to allow charges on the funds for the maintenance of the police in that place shall be deemed to be part of the expenses of such police, and be defrayed accordingly.

7. The first two parts of this act, so far as is consistent with the tenor thereof, shall be construed as one with the said Penal Servitude Acts. Crime, for the purposes of this act, so far as relates to the registration of criminals, shall mean any felony or any offence not a felony specified in the first schedule hereto.

### PART III.

#### HABITUAL CRIMINALS.

8. Where any person is convicted on indictment of any offence specified in the first schedule hereto in England or Ireland, and in the second schedule hereto in Scotland, and he be proved to have been previously convicted of any offence specified in the said schedule, either before or after the passing of this act, then, in addition to any other punishment which may be awarded to him, it shall be deemed to be part of the sentence passed on him, unless otherwise declared by the court, that he is to be subject to the supervision of the police as hereinafter mentioned for a period of seven years, or such less period as the court shall direct, commencing from the time at which he is convicted, and exclusive of the time during which he is undergoing his punishment.

Where any person is subject, in pursuance of this act, to the supervision of the police, he shall be guilty of an offence punishable (on summary conviction before two or more justices or a stipendiary magistrate) with imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them :

First. If, on his being charged by a constable or police officer with getting his livelihood by dishonest means, he fails to make it appear



to the justices or magistrate before whom he is brought that he is not getting his livelihood by dishonest means: 82 & 83 Vict  
c. 99.

Secondly. If he is found by any constable or police officer in any place, whether public or private, under such circumstances as to satisfy the justices or magistrate before whom he is brought that he was about to commit or aid in the commission of any crime punishable on summary conviction or indictment, or was waiting for an opportunity to commit or aid in the commission of any such crime: *Habitual  
Criminals Act.*

Thirdly. If he is found by any person in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground, or nursery ground, without being able to account to the satisfaction of the justices or magistrate before whom he is brought for his being found on such premises.

Any person charged with being guilty of any offence punishable on summary conviction under this section may be taken into custody by any constable or police officer without warrant, or may, if charged with being guilty of an offence committed under the circumstances thirdly hereinbefore mentioned, or any of them, be apprehended by the owner or occupier of the property on which he is found, or by the servants of the owner or occupier, or by any other person authorised by the owner or occupier, and may be detained until he can be delivered into the custody of a constable or police officer for the purpose of being brought before the justices or magistrate; provided that no person shall be so taken into custody on the ground that he is suspected of getting his livelihood by dishonest means except under a written authority from a chief officer of police.

When a person is convicted under this section of an offence which subjects him to the supervision of the police, the record of his conviction shall contain a statement to the effect that he is subject to the supervision of the police in pursuance of this act for a period of seven years commencing from the date of his conviction, and exclusive of the time during which he is undergoing his punishment, or words to the like purport, but the omission of any such statement shall not exempt any person from the operation of this section.

A convict who has been sentenced to penal servitude shall not during the time when he is at large under a licence granted under the said Penal Servitude Acts, or any of them, be deemed for the purposes of this section to be undergoing his punishment.

9. And whereas by the fourth section of the act passed in the fifth year of the reign of King George the Fourth, chapter eighty-three, intituled "An Act for the Punishment of idle and disorderly Persons, and Rogues and Vagabonds, in that Part of Great Britain called England," it is, amongst other things, provided that every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond, and may be apprehended and committed to prison with hard labour for any time not exceeding three calendar months: And whereas doubts are entertained as to the nature of the evidence required to prove for the purposes of the said section the intent to commit a felony: Be it enacted, that in proving such intent it shall not be necessary to show that the person suspected *Amendment  
of sect. 4 of  
the Vagrant  
Act (5 Geo. 4,  
c. 83).*

82 & 83 Vict. c. 99. *Habitual Criminals Act.* was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justices or magistrate, it appears to such justices or magistrate that his intent was to commit a felony.

Penalty for harbouring thieves, &c. '25 & 26 Vict. c. 101, s. 337). 10. Every person who occupies or keeps any lodging-house, beerhouse, public house, or other place where exciseable liquors are sold, or place of public entertainment or public resort, and knowingly lodges or harbours thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein, or allows the deposit of goods therein having reasonable cause for believing them to be stolen, shall be liable, on summary conviction, to a penalty not exceeding ten pounds, and the justices or magistrate before whom he is brought may, if they or he think fit, in addition to or in lieu of any penalty, require him to enter into recognisances, with or without sureties, for keeping the peace or being of good behaviour during twelve months :

(1.) Provided that no person shall be imprisoned for not finding sureties in pursuance of this section for a longer period than three months :

(2.) The security required from a surety shall not exceed twenty pounds :

And any licence for the sale of any exciseable liquors or for keeping any place of public entertainment or public resort which has been granted to the occupier or keeper of any such house or place as aforesaid shall be forfeited on his first conviction of an offence under this section, and on his second conviction for such an offence he shall be disqualified for a period of two years from receiving any such licence ; moreover, where two convictions under this section have taken place within a period of two years in respect of the same premises, whether the persons convicted were or were not the same, the justices or magistrate may, if they or he so think fit, direct that for a term not exceeding one year from the date of the last of such convictions no such licence as aforesaid shall be granted to any person whatever in respect of such premises ; and any licence granted in contravention of this section by the excise or otherwise shall be void.

#### PART IV.

##### RECEIVERS OF STOLEN GOODS.

Burden of proof in cases of receiving stolen goods. 11. Where any person who either before or after the passing of this act has been previously convicted of any offence specified in the first schedule hereto, and involving fraud or dishonesty, is found in the possession of stolen goods, evidence of such previous conviction shall be admissible as evidence of his knowledge that such goods have been stolen ; and in any proceedings that may be taken against him as receiver of stolen goods, or otherwise in relation to his having been found in possession of such goods, proof may be given of his previous conviction before evidence is given of his having been found in possession of such stolen goods ; provided that not less than seven days' notice shall be given to such person that proof is intended to be given of his previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary.

Moreover, where proceedings are taken against any person for having in his possession stolen goods, evidence may be given that there were found in the possession of such person other goods stolen within the preceding

period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the goods to be stolen which form the subject of the proceedings taken against him. 32 & 33 VICT. c. 99.

Any constable or police officer may, if authorised so to do in writing by a chief officer of police, enter any house, shop, warehouse, yard, or other premises in search of stolen goods, and make such search and seize and secure any property he may believe to have been stolen, in such manner as he would be authorised to do if he had a search warrant, and the property seized, if any, corresponded to the property described in such search warrant: Provided that in every case in which any property is seized, the person on whose premises it was at the time of seizure, or the person from whom it was taken if other than the person on whose premises it was, shall, unless previously charged with receiving the same knowing it to have been stolen, be summoned within three days before a justice of the peace or other competent magistrate to account for his possession of such property, and such justice or other magistrate shall make such order respecting the disposal of such property as the justice of the case may require; and it shall be lawful for any chief officer of police to give such authority as aforesaid in the following cases: *Habitual Criminals Act.*

First. When such premises are at, or have been within eighteen months of, the time of such search in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves:

Secondly. When such premises are at the time of such search in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment:

And it shall not be necessary for such chief officer of police in giving such authority to specify any particular property, but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods.

## PART V.

### ASSAULTS ON POLICE.

12. Where any person is convicted of an assault and battery on any constable or police or peace officer when in the execution of his duty, such person shall on summary conviction before two or more justices, or one stipendiary magistrate, be liable either to pay a penalty not exceeding twenty pounds, and in default of payment to be imprisoned for a term not exceeding six months, or in the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labour. *Assaults on police.*

## PART VI.

### GENERAL PROVISIONS.

13. Any person accused of an offence punishable on summary conviction under this act may be remanded from time to time by the justices or magistrate before whom he is brought for the purpose of enabling evidence to be obtained against him, or for any other just cause. *Power to remand.*

14. The forms set forth in the second schedule to this act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and when used shall be deemed to be valid and sufficient in law. *Forms in schedule.*

32 & 38 VICT.  
c. 99.

*Habitual  
Criminals Act.*

Constabulary  
station to  
include police  
stations in  
Dublin.

Children of  
convicts.

Penalty on  
dealer in old  
metals.

15. The term "constabulary station" in section four of "The Penal Servitude Act, 1864," shall include any police station within the police district of Dublin metropolis.

16. The provisions of "The Industrial Schools Act, 1861," shall apply to all children under the age of fourteen years of any woman who shall be convicted for the second time of any offence specified in the first schedule hereto, when such children shall at the time of the conviction be under her care and control, and have no visible means of subsistence.

17. Any dealer in old metals as defined in "The Old Metal Dealers Act, 1861," who shall either personally or by any servant or agent purchase, receive, or bargain for lead, whether new or old, in any quantity at one time of less weight than one hundred and twelve pounds, or who shall personally or by any servant or agent purchase, receive, or bargain for copper, whether new or old, in any quantity at one time of less weight than fifty-six pounds, shall be liable to a penalty of five pounds, to be recovered in the same manner as penalties incurred under the said recited act are therein directed to be recovered.

#### FIRST SCHEDULE.

Any felony not punishable with death also, or the offence of uttering false or counterfeit coin or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or misdemeanor under the fifty-eighth section of the twenty-fourth and twenty-fifth Victoria, chapter ninety-six.

#### SECOND SCHEDULE.

Robbery, theft, assault with intent to rob, stoutthrief, falsehood, fraud, and wilful imposition, obtaining goods or money by false pretences, uttering false or counterfeit coin.

#### THIRD SCHEDULE.

To wit. { To a constable of the said county of , and to the  
keeper of the prison at , in the said county,  
and to the governor of the (convict prison).

Whereas *A.B.* was this day brought before me the undersigned, one of Her Majesty's justices of the peace in and for the said county of having been taken into custody by *C.D.*, a constable of the said county, under the provisions of "The Habitual Criminals Act, 1869," the said *A.B.* being the holder of a licence granted under "The Penal Servitude Acts, 1853, 1857, and 1864," or some of them, and suspected of getting a livelihood by dishonest means, and the said *A.B.*, the holder of the said licence, having failed to make it appear to the satisfaction of me the said justice that he is not getting a livelihood by dishonest means, the said licence so held by the said *A.B.* is forfeited; I, the said justice, in pursuance of the above first-recited act, do commit the said *A.B.* to the prison, there to be detained until he can conveniently be removed to the

(convict prison); and I the said justice do therefore require you the said constable to take the said *A.B.*, and him safely to convey to the prison aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you the said keeper to receive into your custody the said *A.B.* in the said prison, and there safely keep him until he can conveniently be removed as aforesaid; and I do

hereby require the said governor of the said (*convict prison*) to receive the said *A.B.*, and to detain him until he has undergone the term of penal servitude to which he is liable under "The Penal Servitude Acts, 1853, 1857, and 1864," or some of such acts.

32 & 33 Vict.  
c. 99.  
*Habitual  
Criminals Act.*

Given under my hand and seal at \_\_\_\_\_ in the said county, this  
day of \_\_\_\_\_ in the year of our Lord, one thousand eight  
hundred and \_\_\_\_\_.

To wit. { To \_\_\_\_\_ a constable in the said county of \_\_\_\_\_, and to the  
keeper of the house of correction at \_\_\_\_\_, in the said county.

Whereas *A.B.*, being a person subject by the provisions of "The Habitual Criminals Act, 1869," to the supervision of the police, has been taken into custody by *C.D.*, a constable, and brought this day before us the undersigned, two of Her Majesty's justices of the peace in and for the county of \_\_\_\_\_, and charged before us upon the oath of the said *C.D.*, taken before us in the presence and hearing of the said *A.B.* [with being suspected by the said *C.D.* of getting his livelihood by dishonest means] or [with being found by the said *C.D.* in \_\_\_\_\_, under such circumstances as to give rise to suspicion that the said *A.B.* was about to commit or aid in the commission of a crime punishable on summary conviction or indictment (that is to say), \_\_\_\_\_ or waiting for an opportunity to commit or aid in the commission of a crime punishable on summary conviction or indictment (that is to say), \_\_\_\_\_] or [with being found by \_\_\_\_\_ in or upon a dwelling house, or building, or yard, or premises, being parcel of or attached to a dwelling house, or in or upon a shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground, or nursery ground, the said *A.B.* not being able satisfactorily to account for his being found on the said \_\_\_\_\_].

We, the said justices, do in pursuance of the above recited act convict the said *A.B.* of the said offence, and adjudge that the said *A. B.* for the said offence shall be imprisoned in the house of correction at \_\_\_\_\_ in the said county, and there kept to hard labour for the space of \_\_\_\_\_. These are therefore to command you, the said constable, to take the said *A.B.* and him safely to convey to the house of correction aforesaid, and there to deliver him to the keeper thereof, together with this precept; and we do hereby command you, the said keeper of the said house of correction, to receive the said *A. B.* into your custody in the said house of correction, there to imprison him and keep him to hard labour for the space of \_\_\_\_\_.

Given under our hands and seals at \_\_\_\_\_ in the said county this  
day of \_\_\_\_\_ in the year of our Lord, one thousand eight  
hundred and \_\_\_\_\_.

T w . { To \_\_\_\_\_ a constable of the said county of \_\_\_\_\_, and to the  
keeper of the house of correction at \_\_\_\_\_, in the said county  
of \_\_\_\_\_.

Whereas *A.B.* has been this day brought before us, the undersigned, two of Her Majesty's justices of the peace in and for the county of \_\_\_\_\_, under the provisions of "The Habitual Criminals Act, 1869," and it has been duly proved upon oath before us that the said *A.B.* has been three times convicted of felony: And whereas he is charged before us upon the oath of *C.D.*, a constable, for that the said *A.B.* on the \_\_\_\_\_ day of \_\_\_\_\_ at the parish of \_\_\_\_\_ in the said county of \_\_\_\_\_ "was found by the said *C.D.* in \_\_\_\_\_ under such circumstances as to give rise to suspicion



82 & 33 Vict.  
c. 99.

*Habitual  
Criminals Act.*

that he was about to commit or to aid in the commission of a crime punishable on summary conviction or indictment, or was waiting for an opportunity to commit or aid in the commission of a crime punishable on indictment or summary conviction;" or, [" was found by in or upon any dwelling house, or any building, or yard, or premises, being parcel of, or attached to such dwelling house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground, or nursery ground, without being able satisfactorily to account for his being found on such premises,"] contrary to the statute: Now we the said justices do, in pursuance of the above-recited act convict the said A.B. of the said offence, and adjudge that the said A.B. for the said offence shall be imprisoned in the house of correction at in the said county, and there kept to hard labour for the space of .

These are therefore to command you, the said constable, to take the said A.B. and him safely to convey to the house of correction aforesaid, and there to deliver him to the keeper thereof, together with this precept; and we do command you, the said keeper of the said house of correction, to receive the said A.B. into your custody in the said house of correction, there to imprison him and keep him to hard labour for the space of .

Given under our hands and seals at this day of  
in the year of our Lord, one thousand eight hundred and .

To wit. { To a constable of the said county of , and to the  
keeper of the house of correction at , in the said county  
of .

Whereas A.B. was on this day duly convicted before me the undersigned, one of Her Majesty's justices of the peace in and for the county of having been brought before me by C.D., a constable, under the provisions of "The Habitual Criminals Act, 1869," and charged upon the oath of the said C.D., taken before me in the presence and hearing of the said A.B. of being a rogue and vagabond within the intent and meaning of the statutes made in the fifth year of the reign of His late Majesty King George the Fourth, intituled "An Act for the Punishment of idle and disorderly Persons and Rogues and Vagabonds in that Part of Great Britain called England," and "The Habitual Criminals Act, 1869," before mentioned (that is to say), for that the said A.B. on the day of in the year of our Lord, one thousand eight hundred and , in the parish of , in the said county of [here set out the circumstances under which the justice was of opinion that the said A.B. might reasonably be suspected to have intended to commit a felony], contrary to the said statutes. And it was thereby adjudged that the said A.B. for the said offence should be imprisoned at the house of correction at in the said county, and there kept to hard labour for the space of .

These are therefore to command you the said constable to take the said A.B., and him safely to convey to the house of correction aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do command you, the said keeper of the said house of correction, to receive the said A.B. into your custody in the said house of correction, there to imprison him and keep him to hard labour for the space of .

Given under my hand and seal at this day of in  
the year of our Lord, one thousand eight hundred and .



STATUTES AND PARTS OF STATUTES AFFECTING  
THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1870.

FORFEITURES FOR TREASON AND FELONY ABOLITION ACT.

33 & 34 VICT. CAP. 23.

*An Act to abolish Forfeitures for Treason and Felony, and to otherwise amend the Law relating thereto.*—[4th July, 1870.]

WHEREAS it is expedient to abolish the forfeiture of lands and goods for treason and felony, and to otherwise amend the law relating thereto :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows ; (that is to say,)

Sect. 1. From and after the passing of this act no confession, verdict, Forfeiture, &c. inquest, conviction, or judgment of or for any treason or felony or *felo de se* abolished. shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this act shall affect the law of forfeiture consequent upon outlawry.

2. Provided nevertheless, that if any person hereafter convicted of Conviction for treason or felony, for which he shall be sentenced to death, or penal treason or felony to be a servitude, or any term of imprisonment with hard labour, or exceeding twelve months, shall at the time of such conviction hold any military or disqualifica- naval office, or any civil office under the Crown or other public employ- tion for offices, &c. ment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or be entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office, benefice, employment, or place shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person shall receive a free pardon from Her Majesty, within two months after such conviction, or before the filling up of such office, benefice, employment, or place if given at a later period ; and such person shall become, and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from Her Majesty), shall continue thenceforth incapable of holding any military or naval office, or any civil office under the Crown or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland.

33 & 34 Vict.  
c. 23.

*Forfeitures for  
Treason and  
Felony  
Abolition Act.*

Persons con-  
victed of  
treason or  
felony may be  
condemned in  
costs.

Compensation  
to persons  
defrauded or  
injured by  
felony.

The word  
"forfeiture"  
defined.

The word  
"convict"  
defined.

When convict  
shall cease to  
be subject to  
operation of  
the act.

Convict dis-  
abled to sue  
for or to  
alienate pro-  
perty, &c.

3. It shall be lawful for any court, by which judgment shall be pronounced or recorded, upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension, or may be enforced at the instance of any person liable to pay, or who may have paid the same, in such and the same manner (subject to the provisions of this act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced: Provided, that in the meantime and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this act had not passed; and any money which may be recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses may have been paid or defrayed.

4. It shall be lawful for any such court as aforesaid, if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding one hundred pounds, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this act.

5. The word "forfeiture," in the construction of this act, shall not include any fine or penalty imposed on any convict by virtue of his sentence.

6. The expression "convict," as hereinafter used, shall be deemed to mean any person against whom, after the passing of this act, judgment of death, or of penal servitude, shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland upon any charge of treason or felony.

7. When any convict shall die or be made bankrupt, or shall have suffered any punishment to which sentence of death if pronounced or recorded against him may be lawfully commuted, or shall have undergone the full term of penal servitude for which judgment shall have been pronounced or recorded against him, or such other punishment as may by competent authority have been substituted for such full term, or shall have received Her Majesty's pardon for the treason or felony of which he may have been convicted, he shall thenceforth, so far as relates to the provisions hereinafter contained, cease to be subject to the operation of this act.

8. No action at law or suit in equity for the recovery of any property, debt, or damage whatsoever shall be brought by any convict against any person during the time while he shall be subject to the operation of this act; and every convict shall be incapable, during such time as aforesaid, of alienating or charging any property, or of making any contract, save as hereinafter provided.

9. It shall be lawful for Her Majesty, or for any person in that behalf authorised by Her Majesty, under her royal sign manual (and which authority may be given either generally or with reference to any particular case), if to Her Majesty or to the person so authorised it shall seem fit, by writing under Her Majesty's royal sign manual, or under the hand of the person so authorised as aforesaid, to commit the custody and management of the property of any convict, during Her Majesty's pleasure, to an administrator, to be by such writing appointed in that behalf, and every such appointment may be revoked by the same or the like authority by which it is made; and upon any determination thereof, either by revocation or by the death of any such administrator, a new administrator may be appointed by the same or the like authority from time to time; and every such new administrator shall, upon his appointment, be and be deemed to be the successor-in-law of the former administrator; and all property vested in, and all powers given to, such former administrator by virtue of this act shall thereupon devolve to and become vested in such successor, who shall be bound by all acts lawfully done by such former administrator during the continuance of his office; and the provisions hereinafter contained with reference to any administrator shall, in the case of the appointment of more than one person, apply to such administrators jointly.

83 & 84 Vict.  
c. 28.

*Forfeitures for  
Treason and  
Felony  
Abolition Act.*

The Crown  
may appoint  
administrators  
of any con-  
vict's property.

10. Upon the appointment of any such administrator in manner aforesaid all the real and personal property, including choses in actions, to which the convict named in such appointment was at the time of his conviction, or shall afterwards while he shall continue subject to the operations of this act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein.

Convict's  
property to  
vest in admi-  
nistrators on  
their  
appointment.

11. If, in the instrument by which any such administrator is appointed, provision shall be made for the remuneration of such administrator out of the property of the convict, the said administrator may receive and retain for his own benefit such remuneration accordingly.

Remuneration  
of adminis-  
trators.

12. The administrator shall have absolute power to let, mortgage, sell, convey, and transfer any part of such property as to him shall seem fit.

Administra-  
tors to have  
administration  
of property  
during  
sentences of  
convicts.

13. It shall be lawful for the administrator to pay or cause to be paid out of such property, or the proceeds thereof, all costs and expenses which the convict may have been condemned to pay; and also all costs, charges, and expenses incurred by such convict in and about his defence; and also all such costs, charges, and expenses as the said administrator may incur or be put to in or about the carrying this act into execution with reference to such property, or with reference to any claims which may be made thereon.

Administrator  
to pay out of  
property costs  
of prosecution  
and costs of  
executing this  
act.

14. The administrator may cause payment or satisfaction to be made out of such property of any debt or liability of such convict which may be established in due course of law, or may otherwise be proved to his satisfaction, and may also cause any property which may come to his hands to be delivered to any person claiming to be justly entitled thereto, upon the right of such person being established in due course of law, or otherwise to his satisfaction.

Administrator  
may pay out of  
property  
debts or  
liabilities of  
convict.

15. The administrator may cause to be paid or satisfied out of such property such sum of money by way of satisfaction or compensation for any loss of property or other injury alleged to have been suffered by any person through or by means of any alleged criminal or fraudulent act of such convict, as to him shall seem just, although no proof of such alleged criminal or fraudulent act may have been made in any court of law or

Administra-  
tors may make  
compensations  
out of property  
to persons  
defrauded by  
criminal acts  
of convict.

33 & 34 Vict.  
c. 23.

*Forfeitures for  
Treason and  
Felony  
Abolition Act.*

Administrator  
may make  
allowances out  
of property  
for support of  
family of  
convict.

Exercise of  
administra-  
tor's power as  
to priority of  
payments by  
administrator  
for purposes of  
act not to be  
called in  
question.

Property to be  
preserved for  
convict, and to  
revert to him  
or his repre-  
sentatives on  
completion of  
sentence,  
pardon, or  
death.

Administra-  
tors not to be  
liable except  
for what they  
receive.

Administrator  
to receive  
costs of suits

equity; and all claims to any such satisfaction or compensation may be investigated in such manner as the administrator shall think fit, and the decision of the administrator thereon shall be binding: Provided always, that nothing in this act shall take away or prejudice any right, title, or remedy to which any person alleging himself to have suffered any such loss or injury would have been entitled by law if this act had not passed.

16. The administrator may cause such payments and allowances for the support or maintenance of any wife or child, or reputed child of such convict, or of any other relative or reputed relative of such convict dependent upon him for support, or for the benefit of the convict himself, if and while he shall be lawfully at large under any licence, as to such administrator shall seem fit, to be made from time to time out of such property, or the income thereof.

17. The several powers hereinbefore given to the said administrator, or any of them, may be exercised by him in such order and course, as to priority of payments or otherwise, as he shall think fit; and all contracts of letting or sale, mortgages, conveyances, or transfers of property, *bonâ fide* made by the said administrator under the powers of this act, and all payments or deliveries over of property *bonâ fide* made by or under the authority of the said administrator for any of the purposes hereinbefore mentioned, shall be binding; and the propriety thereof, and the sufficiency of the grounds on which the said administrator may have exercised his judgment or discretion in respect thereof, shall not be in any manner called in question by such convict, or by any person claiming an interest in such property by virtue of this act.

18. Subject to the powers and provisions hereinbefore contained, all such property and the income thereof shall be preserved and held in trust by the said administrator, and the income thereof may, if and when the said administrator shall think proper, be invested and accumulated in such securities as he shall from time to time think fit, for the use and benefit of the said convict and his heirs, or legal personal representatives, or of such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same, and the possession, administration, and management thereof, shall re-vest in and be restored to such convict upon his ceasing to be subject to the operation of this act, or in and to his heirs or legal personal representatives, or such other persons as may be lawfully entitled thereto; and all the powers and authorities by this act given to the said administrator shall from thenceforth cease and determine, except so far as the continuance thereof may be necessary for the care and preservation of such property or any part thereof, until the same shall be claimed by some person lawfully entitled thereto, or for obtaining payment out of such property, or of the proceeds thereof, of any liabilities, or any costs, charges, or expenses, for which provision is made by this act; for which purposes such powers and authorities shall continue to be in force until possession of such property shall be delivered up by the said administrator to some person being or claiming to be lawfully entitled thereto.

19. The said administrator shall not be answerable to any person for any property which shall not actually have come to his hands by virtue of this act, nor for any loss or damage which may happen through any mere omission or nonfeasance on his part to any property vested in him by virtue hereof.

20. The costs as between solicitor and client of every action or suit which may be brought against the said administrator with reference to any such property as aforesaid, whether during the time while the same shall

be and continue vested in him under this act or after the same shall cease to be so vested, and all charges and expenses properly incurred by him with reference thereto, shall be a first charge upon and shall be paid out of such property, unless the court before which such action is tried or such suit is heard shall think fit otherwise to order.

38 & 34 Vict.  
c. 23.

*Forfeitures for  
Treason and  
Felony  
Abolition Act.*

21. If no such administrator as aforesaid shall have been appointed an interim curator of the property of any convict may be appointed by any justices of the peace in petty sessions assembled, or, where there are no petty sessions, by any justice of the peace having jurisdiction in the place where such convict before his conviction shall have last usually resided, upon the application of any person who shall be able to satisfy such justice that the application is made *bond fide* with a view to the benefit of the convict or of his family, or to the due and proper administration and management of his property and affairs; and the interim curator to be appointed may be either the person making the application or any other person willing to accept the office, and competent to discharge its duties, as to such justice shall seem fit.

of property as  
between  
solicitor and  
client.

If no admin-  
istrator,  
interim  
curator may  
be appointed  
by justices.

22. Before making any such appointment the justice shall require the applicant to make oath that no administrator or interim curator of the property of such convict has been to his knowledge or belief already appointed; and the applicant shall also state upon oath, to the best of his knowledge and belief, who are the nearest relatives (including any husband or wife) of such convict, and (if any such there be) where they are residing, and whether any and which of them have consented to or have had notice of such application; and it shall be competent for such justice to require notice of such application to be given to all such persons and in such manner as to such justice shall seem fit.

Proceedings  
before justices.

23. Any interim curator so appointed may be removed, for any cause shown to the satisfaction of the justices or justice or the court, upon the application of any relative of the convict, or of any person interested in the due and proper administration and management of his property and affairs, either by the petty sessions or justice by whom he was appointed (or, in the event of such justice dying or being unable to act, by any other justice having the like jurisdiction) or by any court in which proceedings for an account may be instituted as hereinafter provided; and upon the death or removal of any such interim curator a new interim curator may be appointed in the same manner and by the like authority as aforesaid, or (in case any such proceedings shall be then depending) by the court in which any such proceedings shall be so depending as aforesaid.

Removal of  
interim  
curator for  
cause shown.

24. Every interim curator so appointed as aforesaid shall have power (unless and until an administrator shall be appointed under this act, in which case the authority of such interim curator shall thenceforth cease and determine) to sue in his own name as such interim curator, at law or in equity, for the possession and recovery of any part of the property in respect of which he shall have been so appointed, or for damages in respect of any injury thereto, and to defend in his own name as such interim curator any action or suit brought against such convict or against himself in respect of such property, and to receive and give legal discharges for all rents, dividends, interest, and income of or arising from such property, and also to receive and give discharges for any debts due to such convict, or forming part of his property, and to pay and discharge all or any debts due from such convict out of such property, and to settle and adjust accounts with any debtor or creditor of such convict, and generally to manage and administer the property of such convict; and also to make

Powers of  
interim  
curator.



83 & 84 Vict.  
c. 28.

*Forfeitures for  
Treason and  
Felony  
Abolition Act.*

Personal  
property may  
be sold by  
interim  
curator under  
special order  
of justices or  
court.

Proceedings  
by or against  
interim  
curator not to  
abate if  
administrator  
is appointed.

Execution of  
judgments  
against con-  
vict provided  
for.

Proceedings  
may be taken  
to make  
administrator  
or interim  
curator, &c.  
accountable  
before  
property  
reverts to  
convict.

or cause to be made such payments and allowances for the support or maintenance of any wife or child of such convict, or of any other relative dependent on him for support, as shall be specially authorised by any such justice or court aforesaid (who shall have power from time to time to authorise the same), or by any other court having competent jurisdiction to authorise the same, out of the income of such property, or (in case such income shall be insufficient for that purpose) out of the capital thereof; and every such interim curator shall be entitled to retain out of such property, or out of the income thereof, all his costs, charges, and expenses properly incurred in and about the discharge of his duties as such curator.

25. Any personal property of such convict may be sold and transferred by such interim curator by and with the authority of such justice or court as aforesaid, or of any other court having competent jurisdiction to order the same, but not otherwise; and such interim curator shall be accountable for the proceeds of any property so sold in the same manner as for such property while remaining unsold.

26. All proceedings at law or in equity duly instituted by or against any such interim curator may (in case of an administrator or a new interim curator being afterwards appointed) be continued by or against such administrator or such new interim curator without any abatement thereof, the appointment of such administrator or new interim curator being entered by way of suggestion on the record, or otherwise stated upon the proceedings, according to the practice of such court; and all acts lawfully done and contracts lawfully made by such interim curator with respect to any property of such convict before the appointment of such administrator or such new interim curator shall be binding upon such administrator or such new interim curator after his appointment.

27. All judgments or orders for the payment of money of any court of law or equity against such convict which shall have been duly recovered or made, either before or after his conviction, may be executed against any property of such convict under the care and management of any such interim curator as aforesaid, or in the hands of any person who may have taken upon himself the possession or management thereof without legal authority, in the same manner as if such property were in the possession or power of such convict; and all such judgments or orders may likewise be executed by writ of *scire facias* or otherwise, according to the practice of the court, against any such property which may be vested in any administrator of the property of such convict under the authority of this act.

28. It shall be competent for Her Majesty's Attorney General, or other the chief law officer of the crown for the time being in any part of Her Majesty's dominions, or for any person who (if such convict were dead intestate) would be his heir-at-law, or entitled to his personal estate, or any share thereof, under the Statutes of Distribution or otherwise, or for any person authorised by Her Majesty's Attorney-General, or by such chief law officer as aforesaid, in that behalf, to apply in a summary way to any court which (if such convict were dead) would have jurisdiction to entertain a suit for the administration of his real or personal estate, to issue a writ of summons calling upon any administrator or interim curator of the property of such convict appointed under this act, or any person who without legal authority shall have possessed himself of any part of the property of such convict, to account for his receipts and payments in respect of the property of such convict, in such manner as such court shall direct; and it shall be lawful for such court thereupon to issue such writ of summons, and to enforce obedience thereto, and to all orders and pro-



ceedings of such court consequent thereon, in the same manner as in any other case of process lawfully issuing out of such court; and such court shall thereupon have full power, jurisdiction, and authority to take all such accounts, and to make and give all such orders and directions as to it shall seem proper or necessary for the purpose of securing the due and proper care, administration, and management of the property of such convict, and the due and proper application of the same, and of the income thereof, and the accumulation and investment of such balances, if any, as may from time to time remain in the hands of any such administrator or interim curator, or other person as aforesaid in respect of such property; and so long as any such proceedings shall be pending in any such court, every such administrator or interim curator, or other person, shall act in the exercise of all powers vested in him under this act, or otherwise in all respects as such court shall direct; and it shall be lawful for such court (if it shall think fit) to authorise and direct any act to be done by any such interim curator which might competently be done by an administrator duly appointed under this act.

83 & 84 Vict.  
c. 23.

Forfeitures for  
Treason and  
Felony  
Abolition Act.

29. Subject to the provisions of this act, every such administrator, interim curator, and other person as aforesaid shall, from and after the time when such convict shall cease to be subject to the operation of this act, be accountable to such convict for all property of such convict which shall have been by him possessed or received and not duly administered, in the same manner in which any guardian or trustee is now accountable to his ward or *cestui que trust*; but subject nevertheless and without prejudice to the administration and application of such property under and according to the powers of this act.

Administrator,  
&c. to be  
accountable to  
convict when  
property  
reverts.

30. Provided always, that no property acquired by a convict during the time which he shall be lawfully at large under any licence shall vest in any administrator appointed under this act, but such convict shall be entitled thereto without any interference on the part of any administrator or interim curator appointed under this act, and during the time last aforesaid the disabilities mentioned in the eighth section of this act shall, as to such convict, be suspended.

Property of  
convict  
acquired  
while lawfully  
at large not to  
be subject to  
the operation  
of this act.

31. From and after the passing of this act such portions of the acts of the thirtieth year of George the Third, chapter forty-eight, and the fifty-fourth year of George the Third, chapter one hundred and forty-six, as enacts that the judgment required by law to be awarded against persons adjudged guilty of high treason shall include the drawing of the person on a hurdle to the place of execution, and, after execution, the severing of the head from the body, and the dividing of the body into four quarters, shall be and are hereby repealed.

Judgment in  
cases of high  
treason.

32. Provided always, that nothing in this act shall be deemed to alter or in anywise affect the law relating to felony in England, Wales, or Ireland, except as herein is expressly enacted.

Saving of  
general law  
as to felony.

33. This act shall not apply to Scotland.

Extent of act.

## EVIDENCE AMENDMENT ACT.

33 &amp; 34 VICT. CAP. 49.

*An Act to explain and amend "The Evidence Further Amendment Act, 1869."—[9th August, 1870.]*

WHEREAS it was enacted by the "Evidence Further Amendment Act, 1869," sect. 4, as follows:

"If any person called to give evidence in any court of justice, whether in a civil or a criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:

" 'I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth.'

"And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath:"

And whereas doubts have arisen as to the extent and meaning of the words "court of justice" and "presiding judge" in the said section:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Interpretation  
of "court of  
justice" and  
"presiding  
judge" in  
recited act.  
Short title.  
Not to extend  
to Scotland.

Sect. 1. The words "court of justice," and the words "presiding judge," in sect. 4 of the said Evidence Further Amendment Act, 1869, shall be deemed to include any person or persons having by law authority to administer an oath for the taking of evidence.

2. This act may be cited for all purposes as "The Evidence Amendment Act, 1870."

3. This act shall not extend to Scotland.

## THE EXTRADITION ACT.

33 &amp; 34 VICT. CAP. 52.

*An Act for amending the Law relating to the Extradition of Criminals.—[9th August, 1870.]*

WHEREAS it is expedient to amend the law relating to the surrender to foreign states of persons accused or convicted of the commission of certain crimes within the jurisdiction of such states, and to the trial of criminals surrendered by foreign states to this country:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

*Preliminary,*83 & 84 Vict.  
c. 52.*The Extradition Act.*

Short title.

Where  
arrangement  
for surrender  
of criminals  
made, Order  
in Council to  
apply act.

Sect. 1. This act may be cited as "The Extradition Act, 1870."

2. Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this act shall apply in the case of such foreign state.

Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals :

Restrictions  
on surrender  
of criminals.

(1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character :

(2.) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded :

(3.) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise :

(4.) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

4. An Order in Council for applying this act in the case of any foreign state shall not be made unless the arrangement—

Provisions of  
arrangement  
for surrender.

(1.) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year ; and,

(2.) is in conformity with the provisions of this act, and in particular with the restrictions on the surrender of fugitive criminals contained in this act.

5. When an order applying this act in the case of any foreign state has been published in the *London Gazette*, this act (after the date specified in the order, or if no date is specified, after the date of the publication) shall, so long as the order remains in force, but subject to the limitations,

Publication  
and effect of  
order.

38 & 34 Vict.  
c. 52.

*The Extradition Act.*

Liability of  
criminal to  
surrender.

Order of  
Secretary of  
State for issue  
of warrant in  
United  
Kingdom if  
crime is not of  
a political  
character.

Issue of  
warrant by  
police  
magistrate,  
justice, &c.

restrictions, conditions, exceptions, and qualifications, if any, contained in the order, apply in the case of such foreign state. An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this act, and that this act applies in the case of the foreign state mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

6. Where this act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

7. A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

- (1.) by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and
- (2.) by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of

State an order signifying that a requisition has been made for the surrender of such criminal. 33 & 34 Vict. c. 52.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England. *The Extradition Act.*

The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime. *Hearing of case and evidence of political character of crime.*

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. *Committal or discharge of prisoner.*

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. *Surrender of fugitive to foreign state by warrant of Secretary of State.*

Upon the expiration of the said fifteen days, or, if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed and for the person so authorised as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign state the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of *habeas corpus* is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster, upon *Discharge of persons apprehended if not conveyed out of United Kingdom*

33 & 34 Vict.  
c. 52.

*The Extradition Act.*

within two months.

Execution of warrant of police magistrate.

Depositions to be evidence;  
6 & 7 Vict.  
c. 76.

Authentication of depositions and warrants;  
29 & 30 Vict.  
c. 121.

application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

13. The warrant of the police magistrate issued in pursuance of this act may be executed in any part of the United Kingdom in the same manner as if the same had been originally issued or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same is executed.

14. Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this act.

15. Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this act if authenticated in manner provided for the time being by law, or authenticated as follows :

- (1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued ;
- (2.) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require ; and
- (3.) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place ; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state : And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

*Crimes committed at Sea.*

Jurisdiction as to crimes committed at sea.

16. Where the crime in respect of which the surrender of a fugitive criminal is sought was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect :

- (1.) This act shall be construed as if any stipendiary magistrate in England or Ireland, and any sheriff or sheriff substitute in Scotland, were substituted for the police magistrate throughout this act, except the part relating to the execution of the warrant of the police magistrate :
- (2.) The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime :
- (3.) If the fugitive criminal is apprehended on a warrant issued without the order of a Secretary of State, he shall be brought before the stipendiary magistrate, sheriff, or sheriff substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.



*Fugitive Criminals in British Possessions.*83 & 34 VICT.  
c. 52.*The Extradition Act.*Proceedings as  
to fugitive  
criminals in  
British  
possessions.

17. This act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this act the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications; namely,

- (1.) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the governor of that British possession by any person recognised by that governor as a consul general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign state on behalf of which the requisition is made) as the governor of such colony or dependency :
- (2.) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone :
- (3.) Any prison in the British possession may be substituted for a prison in Middlesex :
- (4.) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

18. If by any law or ordinance made before or after the passing of this act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this act in the case of any foreign state, or by any subsequent order, either—

Suspend the operation within any such British possession of this act, or of any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer ;

Or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this act.

*General Provisions.*

19. Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this act is surrendered by that foreign state, such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

20. The forms set forth in the second schedule to this act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and in the case of a British possession may be so used, *mutatis mutandis*, and when used shall be deemed to be valid and sufficient in law.

21. Her Majesty may, by Order in Council, revoke or alter, subject to the restrictions of this act, any Order in Council made in pursuance of this

As to use of  
forms in  
second  
schedule.  
Revocation,  
&c. of Order  
in Council.

33 & 34 Vic.  
c. 52.

*The Extradition Act.*

Application of  
act in Channel  
Islands and  
Isle of Man.  
Saving for  
Indian  
treaties.

Power of  
foreign state  
to obtain  
evidence in  
United  
Kingdom.

Foreign state  
includes  
dependencies.

Definition of  
terms.

" British  
possession :"

" Legisla-  
ture :"

" Governor :"

" Extradition  
crime :"

" Conviction :"

" Fugitive  
criminal :"

" Fugitive  
criminal of  
a foreign  
state :"

act, and all the provisions of this act with respect to the original order shall (so far as applicable) apply, *mutatis mutandis*, to any such new order.

22. This act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom; and the royal courts of the Channel Islands are hereby respectively authorised and required to register this act.

23. Nothing in this act shall affect the lawful powers of Her Majesty or of the Governor General of India in Council to make treaties for the extradition of criminals with Indian native states, or with other Asiatic states conterminous with British India, or to carry into execution the provisions of any such treaties made either before or after the passing of this act.

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter one hundred and thirteen, intituled " An Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals;" and all the provisions of that act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal: Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

25. For the purposes of this act, every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this act) be deemed to be within the jurisdiction of and to be part of such foreign state.

26. In this act, unless the context otherwise requires,—

The term " British possession " means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature, as hereinafter defined, are deemed to be one British possession :

The term " legislature " means any person or persons who can exercise legislative authority in a British possession, and where there are local legislatures as well as a central legislature, means the central legislature only :

The term " governor " means any person or persons administering the government of a British possession, and includes the governor of any part of India :

The term " extradition crime " means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this act :

The terms " conviction " and " convicted " do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term " accused person " includes a person so convicted for contumacy :

The term " fugitive criminal " means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; and the term " fugitive criminal of a foreign state " means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state :

The term "Secretary of State" means one of Her Majesty's principal Secretaries of State : 33 & 34 Vict. c. 52.

The term "police magistrate" means a chief magistrate of the metropolitan police courts, or one of the other magistrates of the metropolitan police-court in Bow-street : *The Extradition Act.*

The term "justice of the peace" includes in Scotland any sheriff, sheriff's substitute, or magistrate : "Secretary of State :"

The term "warrant," in the case of any foreign state, includes any judicial document authorising the arrest of a person accused or convicted of crime. "Police magistrate :"  
"Justice of the peace :"  
"Warrant."

### *Repeal of Acts.*

27. The acts specified in the third schedule to this act are hereby repealed as to the whole of Her Majesty's dominions ; and this act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the acts so repealed) shall apply (as regards crimes committed either before or after the passing of this act), in the case of the foreign states with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this act. *Repeal of acts in third schedule.*

Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this act had not passed.

## SCHEDULES.

### FIRST SCHEDULE.

#### *List of Crimes.*

The following list of crimes is to be construed according to the law existing in England, or in a British possession, (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this act :

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force.

Rape.

Abduction.

Child stealing.

Burglary and housebreaking.

Arson.

83 & 84 Vict.  
c. 52.

*The Extradition Act.*

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

## SECOND SCHEDULE.

### *Form of Order of Secretary of State to the Police Magistrate*

To the chief magistrate of the metropolitan police courts *or* other magistrate of the metropolitan police court in Bow-street [*or* the stipendiary magistrate at ].

Whereas, in pursuance of an arrangement with , referred to in an Order of Her Majesty in Council dated the day of , a requisition has been made to me, , one of Her Majesty's principal Secretaries of State, by , the diplomatic representative of , for the surrender of , late of , accused [*or* convicted] of the commission of the crime of within the jurisdiction of : Now I hereby, by this my order under my hand and seal, signify to you that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided that the conditions of the Extradition Act, 1870, relating to the issue of such warrant, are in your judgment complied with.

Given under the hand and seal of the undersigned, one of Her Majesty's principal Secretaries of State, this day of 18 .

### *Form of Warrant of Apprehension by Order of Secretary of State.*

Metropolitan police ( To all and each of the constables of the metropolitan police force [*or* of the county *or* borough of ] to wit. )

Whereas the Right Honourable one of Her Majesty's principal Secretaries of State, by order under his hand and seal, hath signified to me that requisition hath been duly made to him for the surrender of late of , accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is therefore to command you in Her Majesty's name forthwith to apprehend the said pursuant to the Extradition Act, 1870, wherever he may be found in the United Kingdom or Isle of Man, and bring him before me or some other [\*magistrate sitting in this court], to show cause why he should not be surrendered in pursuance of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at [\*Bow-street, one of the police courts of the metropolis] this day of 18 .

J. P.

\* Note. — Alter as required.

*Form of Warrant of Apprehension without Order of Secretary of State.*38 & 34 Vict  
c. 52.*The Extradition Act.*

Metropolitan police (To all and each of the constables of the metropolitan police force [or of the county or borough of ] to wit. { of ].

Whereas it has been shown to the undersigned, one of Her Majesty's Justices of the Peace in and for the metropolitan police district [or the said county or borough of ] that late of is accused [or convicted] of the commission of the crime of within the jurisdiction of : This is therefore to command you in Her Majesty's name forthwith to apprehend the said and to bring him before me or some other magistrate sitting at this court [or one of Her Majesty's justices of the peace in and for the county [or borough] of ] to be further dealt with according to law, for which this shall be your warrant.

Given under my hand and seal at Bow-street, one of the police courts of the metropolis, [or in the county or borough aforesaid] this day of 18 J. P.

*Form of Warrant for bringing Prisoner before the Police Magistrate.*

County [or borough] of to wit. { To constable of the police force of and to all other peace officers in the said county [or borough] of .

Whereas late of accused [or alleged to be convicted of] the commission of the crime of within the jurisdiction of has been apprehended and brought before the undersigned, one of Her Majesty's justices of the peace in and for the said county [or borough] of : And whereas by the Extradition Act, 1870, he is required to be brought before the chief magistrate of the metropolitan police court, or one of the police magistrates of the metropolis sitting at Bow-street, within the metropolitan police district [or the stipendiary magistrate for ]: This is therefore to command you the said constable in Her Majesty's name forthwith to take and convey the said to the metropolitan police district [or the said ] and there carry him before the said chief magistrate or one of the police magistrates of the metropolis sitting at Bow-street within the said district [or before a stipendiary magistrate sitting in the said ] to show cause why he should not be surrendered in pursuance of the Extradition Act, 1870, and otherwise to be dealt with in accordance with law, for which this shall be your warrant.

Given under my hand and seal at in the county [or borough] aforesaid, this day of 18 J. P.

*Form of Warrant of Committal.*

Metropolitan police { To one of the constables of the metropolitan police force, [or of the police force of the county or borough of ], and to the keeper of the .

Be it remembered that on this day of in the year of our Lord late of is brought before me the chief magistrate of the metropolitan police courts [or one of the police

38 & 34 Vict. c. 52.  
*The Extradition Act.*

magistrates of the metropolis] sitting at the police court in Bow-street, within the metropolitan police district, [or a stipendiary magistrate for ,] to show cause why he should not be surrendered in pursuance of the Extradition Act, 1870, on the ground of his being accused [or convicted] of the commission of the crime of within the jurisdiction of , and forasmuch as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said act :  
This is therefore to command you the said constable in Her Majesty's name forthwith to convey and deliver the body of the said into the custody of the said keeper of the at , and you the said keeper to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant.  
Given under my hand and seal at Bow-street, one of the police courts of the metropolis, [or at the said ] this day of 18 . J. P.

*Form of Warrant of Secretary of State for Surrender of Fugitive.*

To the keeper of and to .  
Whereas late of accused [or convicted] of the commission of the crime of within the jurisdiction of , was delivered into the custody of you the keeper of by warrant dated pursuant to the Extradition Act, 1870 :  
Now I do hereby, in pursuance of the said act, order you the said keeper to deliver the body of the said into the custody of the said , and I command you the said to receive the said into your custody, and to convey him within the jurisdiction of the said , and there place him in the custody of any person or persons appointed by the said to receive him, for which this shall be your warrant.  
Given under the hand and seal of the undersigned, one of Her Majesty's principal Secretaries of State, this day of .

THIRD SCHEDULE.

| Year and Chapter.    | Title.  |
|----------------------|---|
| 6 & 7 Vict. c. 75    | An Act for giving effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders.        |
| 6 & 7 Vict. c. 76    | An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders.      |
| 8 & 9 Vict. c. 120   | An Act for facilitating execution of the treaties with France and the United States of America for the apprehension of certain offenders. |
| 25 & 26 Vict. c. 70  | An Act for giving effect to a convention between Her Majesty and the King of Denmark for the mutual surrender of criminals.               |
| 29 & 30 Vict. c. 121 | An Act for the amendment of the law relating to treaties of extradition.  |



## THE FORGERY ACT.

33 &amp; 34 VICT. CAP. 58.

*An Act to further amend the Law relating to indictable Offences by Forgery.*  
—[9th August, 1870.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Sect. 1. This act may be cited as " The Forgery Act, 1870."

Short title.

2. This act shall have effect as one act with the act described in the schedule to this act, but shall extend to the United Kingdom.

Construction and extent of act.

3. If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon, issued in pursuance of Part V. of the National Debt Act, 1870, or of any former act,—or demands or endeavours to obtain or receive any share or interest of or in any stock as defined in the National Debt Act, 1870, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered,—with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forgery of stock certificates, &c.

4. If any person falsely and deceitfully personates any owner of any share or interest of or in any such stock as aforesaid, or of any such stock certificate or coupon as aforesaid, and thereby obtains or endeavours to obtain any such stock certificate or coupon,—or receives or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner,—he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Personation of owners of stock.

5. If any person, without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves or makes on any plate, wood, stone, or other material any stock certificate or coupon purporting to be such a stock certificate or coupon as aforesaid, or to be such a stock certificate or coupon as aforesaid in blank, or to be a part of such a stock certificate or coupon as aforesaid,—or uses any such plate, wood, stone, or other material for the making or printing of any such stock certificate or coupon, or blank stock certificate or coupon as aforesaid, or any part thereof respectively,—or knowingly has in his custody or possession any such plate, wood, stone, or other material, or knowingly offers, utters, disposes of, or puts off, or has in his custody or possession any paper on which any such blank stock certificate or coupon as aforesaid, or part of any such stock certificate or coupon as aforesaid, is made or printed,—he shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not

Engraving plates, &c. for stock certificates, &c.

33 & 34 Vict.  
c. 58.

*The Forgery  
Act.*

Forgery of  
certificates  
of transfer of  
stocks from  
England to  
Ireland, &c.

Extension of  
provisions of  
Forgery Act  
to Scotland.

Alteration as  
to Scotland.

exceeding fourteen years and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

6. If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate or duplicate certificate required by Part VI. of the National Debt Act, 1870, or by any former like enactment, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony. and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

7. Sections two and four and all provisions relative thereto of the act described in the schedule to this act, and all enactments amending those sections and provisions, or any of them, shall extend to Scotland.

8. In the application to Scotland of this act, and of the enactments by this act extended to Scotland, the term "high crime and offence" shall be substituted for the term "felony."

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#### THE SCHEDULE.

*Act referred to.*

24 & 25 Vict. c. 98.—An Act to consolidate and amend the statute law of England and Ireland, relating to indictable offences by forgery.

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# INDEX.

## ABANDONMENT.

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*Pleading—Surplusage.*—To an information, charging a common assault, the words were added "in contempt of the Legislative Assembly, in violation of its dignity, and to the great obstruction of its business." On demurrer, held (reversing the judgment of the Supreme Court of New South Wales), that the information was good; the words added not being an allegation of a further or separate offence, but being simply a statement of the consequence resulting from the common assault charged in the earlier part of the information. *Reg. v. Macpherson*. Pr.Co. 604.

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## BANKRUPTCY.

*Bankruptcy examinations—12 & 13 Vict. c. 106, s. 117—24 & 25 Vict. c. 134, s. 203.*—To render an examination of a bankrupt reduced into writing under 12 & 13 Vict. c. 106, s. 117, admissible in evidence as a deposition under the seal of the Court, pursuant to 24 & 25 Vict. c. 134, s. 203, it must appear that his answers after they were reduced into writing were signed and subscribed by the bankrupt. *Reg. v. Kean and others*. Cr.Ap.Ct. 266.

## BETTING.

*Betting Houses Suppression Act—16 & 17 Vict. c. 119—Office or place.*—On land on which there was a racecourse, a small temporary wood structure without a roof was erected, and there were boards in it covered with baize used as desks. A man sat at each desk and entered bets in books made with persons in front of the structure, and received deposits thereon. Over the structure was the name of the proprietor, and betting lists were exhibited in front of the structure: Held, that this was an office or place within "The Betting Houses Suppression Act" (16 & 17 Vict. c. 119, s. 3). *Shaw (app.) v. Morley (resp.)* Ex. 128.

## BIGAMY.

*Onus of proof of first husband or wife being alive at the time of the second marriage.*—

On a prosecution for bigamy, it is incumbent on the prosecutor to prove that the husband or wife, as the case may be, was alive at the date of the second marriage. There is no presumption of law of the continuance of the life of the party for seven years after the date at which he or she was proved to have been alive. The existence of the party at an antecedent period may or may not afford a reasonable inference that he or she was alive at the date of the second marriage; but it is purely a question of fact for the jury. *Reg v. Lumley*. Cr.Ap.Ct. 274.

*Knowledge of the first wife being alive—direction to the jury.*—In 1863 the prisoner married Mary Anne Richards, lived with her about a week, and then left her. It was not proved that he had since seen her. In 1867 he married Elizabeth Evans, his first wife being then alive. On the trial of an indictment for bigamy, the learned judge told the jury that they must be satisfied that the prisoner knew that his first wife was alive at the time of the second marriage: Held, that the direction of the judge to the jury was right, and that it was not necessary to prove affirmatively that at the time of the second marriage the prisoner knew that his first wife was alive. *Reg. v. Jones*. Cr.Ap.Ct. 358.

*Reasonable belief of the death of first wife—Absence for less than seven years.*—It is a good defence to an indictment for bigamy that the prisoner at the time of the second marriage honestly and *bonâ fide* believed that his first wife was dead, and had reasonable grounds for so believing. *Reg. v. Horton*. Cleasby, B. 670.

#### BRIDGE.

*Liability to repair—Hundred*—5 § 6 Will. 4, c. 50.—The 5 & 6 Will. 4, c. 50, s. 5, does not transfer to parishes the liability to repair a bridge, which the inhabitants of a half hundred have always repaired out of the hundred rate made on the half hundred. *Reg. v. the Inhabitants of the Upper Half Hundred of Chart and Longbridge*. Cr.Ap.Ct. 502.

#### CENTRAL CRIMINAL COURT.

*Constitution of the Court—Presence of two judges during a trial—Several Courts—Jurisdiction of the Judge of the London Small Debts Court.*—By the 4 & 5 Will. 4,

c. 36, s. 1 (Central Criminal Court Act), the Lord Mayor for the time being, the Lord Chancellor and Lord Keeper of the Great Seal, and all the judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer . . . the Aldermen of the City of London, the Recorder, the Common Serjeant, the judges of the Sheriffs' Court . . . are to be the judges of the Central Criminal Court. By sect. 2, after describing the limits of the said Act as to area and classes of offences, it is enacted that "it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of all such treasons, murders, felonies, and misdemeanors," &c. The plaintiff in error was tried at the Central Criminal Court upon an indictment for obtaining money by false pretences. The trial lasted several days, and was had before Mr. Kerr, who was originally appointed judge of the Sheriffs' Court, and who, upon that Court being afterwards constituted the London Small Debts Court, became the judge of such last-named Court. The only other judge who was present at the trial was an alderman; but, although several attended on different days, no one and the same alderman attended on each day of the trial. At the time the trial was proceeding other Criminal Courts were being held as branches of the Central Criminal Court. The plaintiff in error having been convicted, she brought error upon the grounds, first, that the same two justices and judges did not inquire of, hear, determine, and adjudge the misdemeanor alleged; secondly, that the said misdemeanors were inquired of by certain of the said justices in a room separate and apart from the others of the said justices then in general session assembled and sitting as usual in their ordinary place of sitting, the said room not having been a place duly appointed, &c.; thirdly, that the said Robert Malcolm Kerr, was not at the time one of the judges of the Sheriffs' Court of the City of London: Held, first, that the Court was properly constituted by the presence throughout the trial of one and the same judge; secondly, that two or more courts were properly held at the same time; thirdly, that Mr. Kerr was a judge of the said Court. *Levenson v. The Queen*. Q.B. 286.

#### COINING.

*Having possession of counterfeit coin after previous conviction—Course of proof at*



*trial—24 & 25 Vict. c. 99, ss. 12 and 37.—* On the trial of an indictment for felonious possession of counterfeit coin, with intent to utter the same, after a previous conviction, the course of proceeding at the trial is prescribed by sect. 37 of 24 & 25 Vict. c. 99, viz., first to try that part of the offence which relates to the possession, and then, if the prisoner be found guilty, to try the prisoner for the previous conviction. *Reg. v. Martin.* Cr.Ap.Ct. 343.

*Uttering counterfeit coin—Husband and wife—Coercion of husband—Question for the jury.—*Sarah McGinnes was indicted for uttering counterfeit coin. It appeared that at the time of the commission of the offence she was in company with a man who went by the same name, and who was convicted at the last assizes of the offence. When the prisoners were taken into custody the police constable addressed the female prisoner as the male prisoner's wife. The male prisoner denied the fact in the hearing and presence of the woman. Sarah McGinnes since her committal had been confined of a child: Held (*per* Byles, J.), that under the circumstances, although the woman had not pleaded her coverture, and even although she had not asserted she was married to the male prisoner when he stated she was not his wife, it was a question for the jury whether, taking the birth of the child and the whole circumstances, there was not evidence of the marriage, and the jury thought there was, and acquitted her. *Reg. v. McGinnes.* Byles, J. 391.

*Having possession of a die—Intent—24 & 25 Vict. c. 99, s. 24—Indictment.—*The 24 & 25 Vict. c. 99, s. 24, makes it a felony to have in custody or possession (*inter alia*) a die impressed with the apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, without lawful authority or excuse (the proof whereof shall lie on the accused): Held, first, that an indictment under this section should allege possession without lawful authority or excuse, but that an indictment which charged possession without lawful excuse was sufficient, as excuse would include authority: Secondly, that the words "the proof whereof shall lie on the accused" only shift the burden of proof, and do not alter the character of the offence: Thirdly, that the fact that the Mint authorities, upon information forwarded to them, gave authority to the die maker to make the die, and that the police

gave permission to him to give the die to the prisoner who ordered him to make it, did not constitute lawful authority or excuse for prisoner's possession of the die: Fourthly, that it was not necessary to complete the offence that the possession should be with a felonious intent other than knowledge of possession without lawful authority or excuse. *Reg. v. Harvey.* Cr.Ap.Ct. 622.

## CONCEALMENT OF BIRTH.

*Secret disposition of the body.—*Leaving the dead body of a child in two boxes, closed, but not locked or fastened, one being placed inside the other in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a "secret disposition of the body" within the meaning of the stat. 24 & 25 Vict. c. 100, s. 60. *Reg. v. George, Bovill, C.J.* 41.

*What is—24 & 25 Vict. c. 100, s. 60.—*What is a secret disposition of the dead body of a child within the meaning of 24 & 25 Vict. c. 100, s. 60, is a question for the jury, depending on the circumstances of the particular case. Where the dead body of a child was thrown into a field, over a wall, 4½ ft. high, separating the yard of a public-house from the field, and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held that this was evidence from which the jury might infer a secret disposition of the body. *Reg. v. Brown.* Cr.Ap.Ct. 517.

*Evidence of.—*Although the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of concealment of birth within 24 & 25 Vict. c. 100, s. 60, yet all the attendant circumstances of the case must be taken into consideration, in order to determine whether or not an offence under the above-mentioned section of the statute has been committed. *Reg. v. Cook.* Lush. J. 542.

*Identification of body of child.—*In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found, and identified as that of the child of which she is alleged to have been delivered. A woman, apparently pregnant, while staying at an inn at Stafford, received by post, on the 28th of August,



1870, a Rugby newspaper, with the Rugby postmark upon it. On the same day her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting-room at Stafford station. It was the dead body of a newly-born child, wrapped in a *Rugby Gazette*, of August 27th, 1870, bearing the Rugby postmark. There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at Stafford Station: Held that this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, and would not, therefore, justify her conviction for concealment of birth. *Reg. v. Williams*. M. Smith, J. 684.

#### CONDONATION OF FELONY.

In an action on a bond in the penal sum of 1400*l.*, the declaration charged that the bond was given by the defendant to the plaintiffs, as trustees of a friendly society, subject to a condition thereunder written, whereby, after reciting that certain moneys to the amount of 1400*l.* were stated to be owing from one J. S. to the plaintiffs, as such trustees, and it had been agreed that the defendant should secure to the plaintiffs the sum of 700*l.*, part of such debt, the condition of the bond was declared to be, &c., and averred that the defendant had not paid the said 700*l.*, or the said penalty. Plea 2. That J. S. had been treasurer of the said society, and there was a deficiency in his accounts as such treasurer of a sum of 1700*l.*, and the said trustees had caused a warrant to be issued for his apprehension with a view to proceed criminally against him for an alleged felony in respect of the said money, and thereupon it was agreed between the said trustees and the defendant that, instead of proceeding criminally against the said J. S., the trustees should accept payment of 1000*l.* in cash, in part of such deficiency, and take the defendant's bond for 1400*l.* as security for payment of 700*l.*, other part of such deficiency, and the bond in the declaration mentioned was delivered and accepted by the trustees; in pursuance of the said illegal agreement, and upon and for no other consideration. Plea 3. As a defence on equitable grounds, the defendant repeated the allegations in plea 2, to the effect that J. S. had been treasurer of the said society, and that

there was a deficiency of a large sum in his accounts, in respect of which the trustees alleged that he had committed a felony, and had caused a warrant to be taken out for his apprehension; and, further, that the said bond was executed and delivered by the defendant to the plaintiffs as such trustees, upon and subject to certain terms and conditions then agreed upon between the said trustees and the defendant and other persons on behalf of J. S., that is to say, upon the terms and conditions that all prosecution of J. S. by the society or by any of its members should cease. And the defendant alleged that all prosecutions of J. S. did not cease, but, on the contrary, he was prosecuted by two members of the said society, and tried and acquitted of the several charges preferred against him. Averment, that all things happened to entitle him in equity to an unconditional injunction to restrain the plaintiffs, as such trustees, from suing on the said bond. On demurrer it was held by the Court of Exchequer, Martin, Channell, and Cleasby, BB. (*dubitante* Martin, B., as to plea 2), that the pleas were good, in answer to the action on the bond as showing an illegal agreement to stifle a prosecution. *Cannon and others v. Rands*. Ex. 631.

#### CONSPIRACY.

6 Geo. 4, c. 129, and 22 Vict. c. 34—*Conspiracy to force workmen to leave their employment*.—On an indictment under 6 Geo. 4, c. 129, s. 3, for conspiracy to force workmen to leave their employment, the evidence being that the defendants merely waited outside the place where the workmen were employed, and tried to induce them not to work there, and that their conduct was civil and peaceable: Held, that the question was, whether they had endeavoured to control the free action or overcome the free will of the workmen by force or intimidation. If there had been merely persuasion, no matter what the consequence of it was, peaceable and unaccompanied by menace or violence, this would not render the defendants amenable to criminal justice on such a charge, they being then protected by 22 Vict. c. 34. *Reg. v. Shepherd and others*. Lush, J. 325.

*Mock auction—False representation—Conspiracy—Evidence*.—A mock auction, with sham bidders, who pretend to be

real bidders for the purpose of selling goods at prices grossly above their worth, is an offence at common law; and persons aiding or abetting such a proceeding may be indicted for a conspiracy with intent to defraud. *Reg. v. Levine* (10 Cox Crim. Cas.) explained. *Reg. v. Lewis and others*. Willes, J. 404.

To cheat and defraud by circulating a false prospectus. 414.

*To defraud a partner.*—Prisoner and L. were in partnership, and there being notice of dissolution, prisoner conspired with W. and P. in order to cheat L., on a division of the assets at the dissolution, by making it appear by documents and entries in the books that P. was a creditor of the firm; and by reason thereof, partnership property was to be abstracted for the alleged object of satisfying P.: Held that this was an indictable conspiracy. Cr.Ap.Ct. 584.

## CONSTABLE.

(See POLICE.)

## DEBTORS ACT.

32 & 33 Vict. c. 62, s. 11, sub-sect. 15—*Evidence—Costs.*—By the Debtors Act, 1869, s. 11, it is enacted that “any person adjudged a bankrupt . . . shall . . . be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour, if (sub-sect. 15) within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he has no intent to defraud.” A grocer obtained goods of his trade upon credit. Soon after receiving them, and before they were paid for, he executed a bill of sale in favour of his sister who lived with him. This bill of sale, which was given in consideration of a debt owing from him to his sister, passed away all his stock-in-trade and effects whatsoever, including the above-mentioned unpaid-for goods. Having been made bankrupt, he was indicted for misdemeanor under the foregoing section of the Debtors Act, 1869: Held, that the production of the adjudication under the seal of

the court was sufficient evidence of the bankruptcy. That disposing of the goods by bill of sale was not disposing of them in the “ordinary way of trade;” and, therefore, that as property which the prisoner had obtained on credit, and had not paid for, had passed by the bill of sale, he came within the section, unless he had no intent to defraud. But that assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud. Where the prosecution of a bankrupt under the Debtors Act, 1869, is not ordered by any Court, the judge at the trial has no power to allow the costs of the prosecution. *Reg. v. Thomas*. Lush, J. 535.

*Sect. 11—Prosecution under—Disposal of goods before bankruptcy—Intent to defraud—Failure by bankrupt to disclose transactions to trustee.*—By sect. 11 (sub-sect. 1) of 32 & 33 Vict. c. 62, if any bankrupt or person whose affairs are liquidated by arrangement does not (*inter alia*) fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, and how and when and for what considerations he disposed of any part thereof not in the way of his trade, or in the ordinary expense of his family; or (sub-sect. 15) if within four months next before the presentation of a bankruptcy petition against him, or the commencement of a liquidation, he, being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit, and has not paid for, he shall be guilty of a misdemeanor, unless the jury is satisfied that he had no intent to defraud. On the 15th of May the prisoner, who was a tool-maker, gave an order for six tons of steel. On arrival at his wharf he did not allow it to be unloaded, and on the 13th of June sold it at 14s. per cwt. for cash. Its estimated value was 18s. per cwt. On the 28th of June a petition in bankruptcy was filed against the prisoner. He was adjudicated bankrupt on the 29th; on the 4th of July a receiver was appointed, who was subsequently made trustee, but the bankrupt did not discover the above-mentioned transaction until it was forced out of him on the 26th of July before the registrar: Held, that there was a case to go to the jury. *Semble*, it lies upon the prisoner to negative the intent to defraud. *Reg. v. Thomas* (*ante*, p. 535; 22 L. T. Rep. N. S. 138), referred to. *Reg. v. Bolus*. Adams, Q.C. 610.

## EMBEZZLEMENT.

*Cheque—Indictment*—24 & 25 Vict. c. 96, ss. 67, 68.—An indictment for embezzling money under sects. 67 and 68 of 24 & 25 Vict. c. 96, is not proved by showing merely that the prisoner embezzled a cheque, without evidence that it had been converted into money. *Reg. v. Keena*. Cr.Ap.Ct. 123.

*Clerk or servant—Volunteer*.—A person whose duty it is to obtain orders when and where he likes, and forward them to his principal for execution, and then has three months within which to collect the money for the goods sent, is not a clerk or servant. If such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has had nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement if he does not pay over or account for the money so received. *Reg. v. Mayle*. The Recorder. 150.

*Time of appropriation—Secretary of a Trades-Union Society—Russell Gurney's Act* (31 & 32 Vict. c. 116).—The Act to amend the law relating to embezzlement, so as to include the offence committed by one of two or more partners, or beneficial owners, came into operation on the 31st day of July, 1868. In the month of July, the prisoner went out of office as secretary of No. 3 Lodge of the Operative Bricklayers' Society, and failed to hand to his successor the ascertained balance of moneys which should have been in his possession. He was summoned to attend the lodge and account for the moneys on the 1st day of August, 1868. He did not do so, but absconded, and was apprehended at Lowestoft several weeks afterwards: Held, that if the prisoner appropriated the money before the 31st of July he could not be convicted, but that the jury were entitled to look at the date of the meeting to which the prisoner was summoned, and to the date of his absconding, as indications of the date of the appropriation. Upon the question, whether the cited Act can be construed retrospectively as being an Act which applies only to the practice and procedure of courts of justice, the Common Serjeant (after consulting Baron Cleasby) expressed his opinion that it could not be so construed. *Reg. v. Blackburn*. T. Chambers, Q.C. 157.

*Servant or agent*.—Prisoner was engaged by U. at weekly wages to manage a shop.

U. then assigned all his estate and effects to R., and a notice was served on prisoner to act as the agent of R. in the management of the shop. For fourteen days afterwards R. received from U. the shop moneys. Then the shop money was taken by U. as before. Prisoner received his weekly wages from U. during the whole time. Some time after a composition-deed was executed by R. and U., and U.'s creditors, under sect. 192 of the Bankruptcy Act, by which R. reconveyed the estate and effects to U.; but this deed was not registered until after the embezzlement charged against the prisoner: Held, that prisoner was the servant of U. at the time of the embezzlement. *Reg. v. Dixon*. Cr.Ap.Ct. 178.

*Friendly society—Secretary*.—A secretary of a friendly society, established under 18 & 19 Vict. c. 63, in which no trustee had ever been appointed, was convicted on an indictment for embezzlement, prior to the coming into operation of the 31 & 32 Vict. c. 116; and the indictment described him as the servant of the treasurer, and also as the servant of C. (a member), and others: Held that the conviction was wrong. *Reg. v. Diprose*. Cr.Ap.Ct. 185.

*Friendly society—Treasurer*.—The treasurer of a friendly society, formed under 18 & 19 Vict. c. 63, into whose hands the moneys received on behalf of the society were to be paid, and who was to pay no money except by an order signed by the secretary and countersigned by the chairman, or a trustee, and who by the statute was bound to render an account to the trustees and to pay over the balance on such accounting when required, is not a clerk or servant, and cannot be indicted for embezzlement of such balance. *Reg. v. Tyrie*. Cr.Ap.Ct. 241.

*Secretary of company*.—To support a charge of embezzlement against the secretary of a company whose duty it was to receive moneys and pay wages, &c., out of the said moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money. *Reg. v. Wolstenholme*. Cr.Ap.Ct. 311.

*Master and servant—Benefit Building Society—Secretary—Trustees*.—The trustees of a Benefit Building Society borrowed money for the purposes of their society on their individual responsibility (there being no rule of the society authorising them to

borrow money). The money on one occasion was received by the secretary, and embezzled by him: Held, that the secretary might be charged in the indictment for embezzlement as the servant of W. and others, W. being one of the trustees and a member of the society. *Reg. v. Redford*. Cr.Ap.Ct. 367.

*Clerk or servant—Commission.*—The prisoner was employed by a coal merchant under an agreement whereby "he was to receive 1s. per ton procuration fee payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment. Collections to be paid on Friday evening before 5 p.m., or Saturday before 2 p.m." He received no salary, was not obliged to be at the office except on Friday or Saturday to account for what he had received. He was at liberty to go where he pleased for orders: Held, that the prisoner was not a clerk or servant within the statute relating to embezzlement. *Reg. v. Marshall*. Cr.Ap.Ct. 490.

"*Clerk or servant*" — *Commission.* — The prisoner agreed with the prosecutor, a manufacturer of earthenware, to act as his traveller, and "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the prosecutor, and that he would not, without the consent in writing of the prosecutor, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid, for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts. The prosecutor subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement under 24 & 25 Vict. c. 96, s. 68: Held, that he was a "clerk or servant" of the prosecutor within the meaning of that statute. *Reg. v. Bowers* (10 Cox Crim. Cas. 254; 14 L. T. Rep. N.S. 671) and *Reg. v. Marshall* (*ante*, p. 490) cited and distinguished. *Reg. v. Turner*. Lush, J. 551.

*Of funds of trades union.*—32 & 33 Vict. c. 61, s. 44.—An unregistered friendly society or trades union may prosecute its servants for embezzlement of its property, though some of its rules may be void as being in restraint of trade, and contrary to public policy. Rules in a trades society or union

imposing fines upon members for working beyond certain hours, or for applying for work at a firm where there is no vacancy, or for taking a person into a shop to learn weaving where no vacant loom exists, though void as being in restraint of trade, do not render the society criminally responsible. *Reg. v. Stainer*. Cr.Ap.Ct. 483.

## EVIDENCE.

Of false pretence. 5, 600.

Of larceny. 88.

Of confession. 69.

Of manslaughter. 136.

Of bankruptcy easements. 266.

Of receiving. 388.

Of persons jointly indicted. 607.

*Confession.*—The prisoner had volunteered a statement, implicating himself and others in the Fenian conspiracy, to a constable who came to his house to search for arms. The constable asked the prisoner, "Had he any objection to tell that to the superintendent?" The prisoner said he had not; whereupon he went with the constable to the superintendent, and thence to a magistrate, where he made an information on oath to the same effect. The prisoner was not cautioned in the usual way, but no inducement was offered to him to make the information. A few days subsequently he was asked to come and hear the information read in the presence of the accused persons. He went, and made a further information, and on that occasion said, "I came here to save myself." No caution was given on this occasion, and he was bound over to prosecute, and was considered by the magistrate as an approver. The prisoner was not then in custody, nor was there any charge against him. Subsequently he refused to prosecute, and was then arrested, tried, and convicted. At the trial his own informations were used against him: Held (Monahan, C.J., and Keogh, J., *dissentientes*), that the informations were not properly received, and that the conviction was consequently bad: *Per* Fitzgerald and Deasy, BB.—The first information was rightly received, as the prisoner gave no intimation of the expectation under which he made the information; but the second was inadmissible. *Reg. v. Gilles*. Cr.Ap.Ct. Ir. 69.



*Dying declaration—Admissibility.*—In order to render a statement of a deceased person, not on oath, evidence, the prosecution must show that such person at the time of making the statement was distinctly aware of the approach of death, and had no hope of possible recovery. *Reg. v. Mackay*. Lush, J. 148.

*Merchant Shipping Act—Depositions taken abroad—Absence of witnesses.*—A witness whose evidence had been taken abroad by the British consul under the 17 & 18 Vict. c. 104, s. 270, was captain of a British sailing vessel, which was stated, after examination of the official records by an officer of the Board of Trade, never to have been in this country. When some of the witnesses left the captain, he was in charge of the vessel at Bordeaux, but it was not known where she was then bound for, or whether she had since sailed: Held, that it was sufficiently proved that the witness was not in the United Kingdom, and his deposition was accordingly admitted in evidence. *Reg. v. Anderson*. Lush, J. 154.

*Dying declaration—Admissibility.*—The magistrates' clerk administered an oath to a dying person, and she made a statement. He asked her if she felt she was likely to die? She said, "I think so." He said, "Why?" She replied, "From the shortness of my breath." He said, "Is it with the fear of death before you that you make these statements?" and added, "Have you any present hope of your recovery?" She said, "None." He then proceeded to write out the deposition, and when finished read it to her, and asked her to correct any mistake that he might have made. She said, "No hope, at present, of my recovery," and he then inserted those words: Held, that the declaration was inadmissible, as the words "at present" introduced by the deceased were a qualification of her previous statement that she had no hope of recovery. *Reg. v. Jenkins*. Cr.Ap.Ct. 250.

*Dying declaration "Be quick, or I shall die"*—*Deceased not sworn before making declaration.*—A considerable length of time between making statement and time of death does not render statement inadmissible. On a trial for murder, a written declaration of the deceased was put in evidence by the prosecution; the declaration was made before a magistrate. The deceased said, "Be quick, or I shall die," but did not

die for nearly three weeks. Deceased was not sworn before making the declaration: Held, that the declaration was admissible, for the deceased thought he was going to die, and the fact that he did not die for nearly three weeks would not render it inadmissible. It is not absolutely necessary that deceased should have been sworn. *Reg. v. Bernadotti and others*. Brett, J. 316.

*Depositions signed by magistrate—Signature on last page only*—11 & 12 Vict. c. 42, s. 17. —Where the deposition of a deceased person is on separate sheets it is not necessary that the magistrate before whom such deposition is taken should sign his name on each separate sheet, but it is sufficient that the magistrate should sign his name on the last sheet. *Reg. v. Carrol*. Hannen, J. 322.

"*London Gazette*"—*Production.*—The mere production of a copy of the *London Gazette* purporting to be printed by authority, containing an advertisement of adjudication of bankruptcy is sufficient proof of the adjudication of bankruptcy under the 12 & 13 Vict. c. 106, s. 240. *Reg. v. Raudnitz*. Cr.Ap.Ct. 360.

*Witness not in deposition.*—A witness whose evidence is relevant, may be called by the prosecution, although he has not been before the magistrates, and although his name and the substance of his evidence has not been given to the prisoner or his attorney. *Reg. v. Pietro Stiginani* (10 Cox Crim. Cas.) overruled. *Reg. v. Greenslade*. Brett, J. 412.

*Depositions—Magistrate's signature—Pleading—Surplusage.*—It is sufficient if the signature of a committing magistrate be attached, in the form in schedule M. of 11 & 12 Vict. c. 42, at the conclusion of the depositions of the several witnesses, and his signature need not be subscribed to the deposition of each witness respectively. An indictment for making a false declaration before a justice of the peace as to the loss of a pawnbroker's ticket concluded, "Whereas, in truth, the defendant had not lost the said ticket, but had sold, lent, or deposited it as a security to one J. C.:" Held, that the allegation, "that the defendant had sold, lent, or deposited it as a security to J. C." might be rejected as mere surplusage, and did not vitiate the indictment for uncertainty. *Reg. v. Parker*. Cr.Ap.Ct. 478.

*Refusal of witness to give evidence on account of its criminating him—Objection overruled—Motion for a new trial.*—The privilege of refusing to answer questions on the ground that they tend to criminate is that of the witness alone, and neither party to the suit can take any advantage therefrom. A witness called on the part of the Crown to prove bribery against the defendant, refused to give evidence on the ground that his evidence would tend to criminate himself, the objection being overruled by the judge, he gave his evidence: Held, that the defendant could not object that such evidence was improperly received. *Reg. (on the prosecution of the Attorney-General) v. Kinglake.* 499.

*Confession — Inducement — Concealment of birth.*—A., being questioned by a police-constable about the concealment of a birth, gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie." Held, that a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free and voluntary. A. was taken into custody the same day, placed with two accomplices, B. and C., and charged with concealment of birth. All three then made statements. Held, that those made by B. and C. could not be deemed to be affected by the previous inducement to A., and were, therefore, admissible against B. and C. respectively, although that made by A. was not so. The prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say. Whereupon A. made a statement which was taken down in writing, as usual, and attached to the depositions: Held, that this latter statement of A. might be read at the trial as evidence against herself. Mere proof that a woman was delivered of a child and allowed two others to take away its body: Held, insufficient to sustain an indictment against her for concealment of birth. *Reg. v. Bate, Bailey, and Anslow.* M. Smith, J. 686.

### EXPLOSIVE SUBSTANCE.

*Indictment under 24 & 25 Vict. c. 97, s. 10—Explosive substances in condition to explode—Whether necessary.*—S. and others were charged under sect. 10 of the 24 & 25 Vict. c. 97, with feloniously throwing gunpowder against a house, with intent to

damage: Held (by Kelly, C.B.), that in order to support an indictment under this section it is not enough to show that gunpowder or other explosive substance was thrown against the house; but it must also be shown that the substance was in a condition to explode at the time it was thrown, although no actual explosion should result. *Reg. v. Sheppard and others.* Kelly, C.B. 302.

### FALSE IMPRISONMENT.

*Reasonable cause—Evidence of malice.*—A farmer, having lost two trusses of straw, and finding the plaintiffs soon afterwards at a place some two or three miles distant with some loose straw in a cart, gave them into custody, with some expression of irritation, and prosecuted them for stealing it: Held, that if the straw were of the same kind as that lost, and in particular if it were clean and new, there was probable cause for suspicion; but, if otherwise, there was not probable cause; and if the jury thought that the defendant had acted under irritation, rashly, and rather through the influence of angry feeling than with reasonable care or due inquiry, there was evidence of malice on a count for malicious prosecution. *Darling v. Cooper; Beauchamp v. The Same.* Bramwell, B. 533.

### FALSE PRETENCES.

*Evidence.*—An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value 14s. 6d., of which 4s. 6d. had been paid on account, and 10s. only was due, was a bill of parcels of another coat of the value of 22s. The evidence was that the prisoner's wife had selected the 14s. 6d. coat for him subject to its fitting him, and had paid 4s. 6d. on account, for which she received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and the prisoner was then measured for one to cost 22s. When that was made it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner when the coat was given to him handed the bill of parcels for the 14s. 6d., and also 10s. to the prosecutor, saying, "There is 10s. to pay." The bill was receipted, and the prisoner took the 22s. coat away with him. The prosecutor stated that believing the bill of parcels to refer to the 22s. coat, he parted with that coat on payment of 10s.,



otherwise he should not have done so: Held, that there was evidence to support a conviction on the indictment. *Reg. v. Steels.* Cr.Ap.Ct. 51.

When property not parted with. 32.

*Obtaining money by pretending to carry on a certain business.*—The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk. The jury found that the prisoner was not carrying on that business at all: Held, that this was an indictable false pretence. *Reg. v. Crabb.* Cr.Ap.Ct. 85.

*Obtaining value for notes of a bank that has stopped payment—Bankruptcy.*—The defendant, knowing that some old country bank notes had been taken by his uncle forty years before, and that the bank had stopped payment, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. The man passed the notes, and defendant obtained value for them. It appears that the bankers were made bankrupt: Held, that the defendant was guilty of obtaining money by false pretences: Held, also, that the bankruptcy proceedings need not be proved. *Reg. v. Dowry.* Cr.Ap.Ct. 115.

*Evidence.*—The indictment alleged that the prisoner was living apart from her husband under a deed of separation, and was in receipt of an income from her husband, and that he was not to be liable for her debts, yet that she falsely pretended to the prosecutor that she was living with her husband, and was authorised to apply for and receive from the prosecutor goods on the account and credit of her husband, and that her husband was then ready and willing to pay for the goods. The evidence at the trial was that the prisoner went to the prosecutor's shop and selected the goods, and said that her husband would give a cheque for them as soon as they were delivered, and that she would send the person bringing the goods to her husband's office, and that he would give a cheque. When all the goods were delivered, the prisoner told the man who delivered them to go to her husband's office, and that he would pay for them. The man went, but could not see her hus-

band, and ascertained that there was a deed of separation between the prisoner and her husband, which was shown to him. He communicated what he had learnt to the prisoner, who denied the deed of separation. The goods were shortly after removed and pawned by the prisoner. The deed of separation between the prisoner and her husband was put in evidence, by which it was stipulated that the husband was not to pay her debts; and it was proved that she was living apart from her husband, and receiving an annuity from him, and that she was also cohabiting with another man: Held, that the false pretences charged were sufficiently proved by this evidence. *Reg. v. Davis.* Cr.Ap.Ct. 181.

*Evidence.*—On an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well-known practice was for buyers to engage a room at a public-house, and that the prisoner, pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief: Held, there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, a conviction could not be sustained. *Reg. v. Burrows.* Cr.Ap.Ct. 258.

*Representation that goods were unencumbered.*—On the trial of an indictment against the prisoner for pretending that his goods were unencumbered, and obtaining thereby 8*l.* from the prosecutor with intent to defraud, it appeared that the prosecutor lent money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of prisoner and another person, and a declaration made by prisoner that the furniture was unencumbered. The declaration was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the furniture to another person, but not to its full value: Held, that there was evidence to go to the jury in support of a charge of obtaining money by false pretences. *Reg. v. Meakin.* Cr.Ap.Ct. 270.

*Misrepresentation as to value of business.*—A false representation as to the value of a business will not sustain an indictment

for obtaining money by false pretences. On an indictment for obtaining money by false pretences, it appeared that the prisoner, on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt: Held, that the indictment could not be sustained upon either of the representations. *Reg. v. Williamson*. Byles, J. 328.

Falsely personating a soldier to obtain prize money. 333.

*Hiring a horse*—24 & 25 Vict. c. 96, s. 88.—

Prisoner, by falsely pretending to a liveryman that he was sent by another person to hire a horse for him for a drive to E., obtained the horse. The prisoner returned it the same evening, but did not pay for the hire: Held that this was not an obtaining of a chattel with intent to defraud within the meaning of the 24 & 25 Vict. c. 96, s. 88. To constitute such an act there must be an intention to deprive the owner of his property. *Reg. v. Kilham*. Cr.Ap.Ct. 561.

*Attempt to commit the offence*.—The prisoner was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent the prisoner 5s.; but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue: Held, that the prisoner might be convicted on this evidence of attempting to obtain money by false pretences. *Reg. v. Hensler*. Cr.Ap.Ct. 570.

*What is—Indictment—Evidence*.—An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T. and induced prosecutor to part with goods on the representation that he had just come from abroad and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T. and was going to furnish it: Held, that the false pretences charged were sufficient in point of law,

and also that the evidence was sufficient to sustain a conviction. *Reg. v. Howarth*. Cr.Ap.Ct. 588.

*Evidence*.—Prisoner was indicted for obtaining from George Hislop, the master of the Workhouse of the Strand Union, one pint of milk and one egg, by falsely pretending that a certain child then brought by him had been by him found in Leicester-square, whereas, &c. The facts were that the prisoner was waiter at an hotel in George-street, Hanover-square. A female servant there, named Spires, had been delivered of a child by him, which was put out to nurse. The child falling ill, the nurse brought it to the hotel, and the prisoner, saying that he would find another nurse, took the woman with him to Westminster, where the nurse put the child into his arms and went away. He took it to the workhouse of St. Martin's-in-the-Fields, which is in the Strand Union, and delivered it to the master, stating that he had found it in Leicester-square. It was by the master delivered to the nurse to be taken care of, and the nurse fed it with the pint of milk and egg which was the subject of the charge in the indictment as the property obtained by the false pretence alleged: Held, that this evidence did not sustain the indictment. First, because the child not having been affiliated there was no legal obligation on the prisoner to maintain it, and therefore for the purposes of this indictment it must be treated as if a stranger had put a strange child in his arms, when it would have been rightly delivered by him to the relieving officer; secondly, that even if there had been a sufficient false pretence, the milk and egg given to the child, not at the prisoner's request, but by the workhouse matron in the course of her duty, was too remote to be an obtaining of such food by him. *Reg. v. Carpenter*. Cox, Serjt. 600.

*Cheque not to be presented until a future day*

—*Direction to jury*.—Prosecutor agreed to sell a mare, warranted sound, to the prisoner for 20l. 10s. Prisoner came and took the mare away on a Thursday, giving a banker's cheque for the price, which, at the request of the prisoner, the prosecutor agreed not to cash till Saturday. Prosecutor, however, paid this cheque to his bankers on the same Thursday; they returned it to him on the Saturday indorsed "no account." It was proved that the prisoner had no effects at the bank on which the cheque was drawn on the

Saturday, or on any day for a long time previously. For the prisoner, B., a witness, proved that he had requested prisoner to buy a horse for him (B.), and that prisoner had told B. that he thought he knew of a mare that would suit, and asked B. for a cheque, which B. did not give, as he had not his cheque book with him; that the prisoner, on the Monday after the said Saturday, told B. he had bought a horse for him for 20*l.* 10*s.*; and that B. sent a cheque to him on the following day for the amount. On the Wednesday the mare was sent back to the prosecutor, with a veterinary certificate that she was not sound, a summons against the prisoner having been taken out by the prosecutor and left at the prisoner's house on the previous Monday. At the close of the evidence prisoner's counsel contended that the prisoner ought to be acquitted, first, because, the prosecutor having broken the contract, the charge of false pretences could not be maintained; secondly, because there was no false pretence of an existing fact, as the prisoner did not allege he had funds at the bank at the time he drew the cheque; thirdly, because upon B.'s evidence the prisoner had reasonable cause to believe that the cheque would be paid on the Saturday. The court overruled the objections, and directed the jury that if they believed that the prisoner knew he had no funds at the bank at the time he gave the cheque, and that the prosecutor had parted with the mare upon the belief that the cheque was a good and valid one, they must find the prisoner guilty. The jury thereupon found the prisoner guilty: Held, that the direction to the jury was wrong, and that the case ought not to have been left to them, and that the conviction ought to be quashed. *Reg. v. Walne*, Cr.Ap.Ct. 647.

#### FORFEITURE FOR FELONY.

*Compensation.*—Sect. 4 of the Forfeiture for Felony Act, 1870 (33 & 34 Vict. c. 23), which empowers the court to award any sum of money not exceeding 100*l.*, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by reason of the said felony, such sum to be "deemed a judgment-debt to the person entitled to receive the same from the person so convicted," requires to be exercised with considerable caution, as being liable to abuse by arrangements in the nature of condonation of a felony. On an indictment of a servant for steal-

ing money from his master, it had been arranged between the counsel for the prisoner and the prosecutor that the prisoner should repay the money he had stolen, and that prosecutor should recommend that he be discharged, without punishment, on his own recognisances to come up for judgment when called upon, and that the court should order that sum to be paid as compensation to the prosecutor under sect. 4. The prisoner having pleaded guilty to the charge, an application was made by counsel, stating the above arrangement. But the Court refused its assent to any compromise, as not being within the intention of this provision of the Act, which contemplated compensation to the party wronged, as an addition to, and not as a substitute for, the punishment due to the crime. *Reg. v. Lovett*. Cox, Serjt. 602.

#### FORGERY.

*Engraving plate of a Scotch bank note*—*Jurisdiction.*—It is an offence under the 24 & 25 Vict. c. 98, s. 16, feloniously, and without lawful excuse, to engrave upon a plate in England a note of a bank in Scotland, or in the Colonies. *Reg. v. Brackenridge and King*. Cr.Ap.Ct. 96.

*Bill of exchange*—*No signature of drawer.*—The acceptance to what purported to be a bill of exchange was forged. At the time, however, this was so forged, the document had not been signed by the drawer: Held, that the document, not having the signature of the drawer attached to it at the time the acceptor's name was forged, was not a bill of exchange. *Reg. v. Mopsey*. Chambers, Q.C. 143.

*Promissory note*—*Seaman's advance note.*—Prisoner forged a seaman's advance note. He was indicted for forging or uttering a certain promissory note or order for the payment of money: Held that a seaman's advance note was not a promissory note or order for payment of money, and that the indictment was therefore bad. *Reg. v. Howie*. Hannen, J. 320.

*Deed*—*Ante-dating.*—R. made an equitable deposit of title-deeds with G. for 730*l.*, and afterwards assigned all his property to B. for the benefit of his creditors. R. and his assignee B. then, for an additional advance, conveyed to G. the freehold of the property to which the deeds deposited related. After this the prisoner R. exe-

cuted a deed of assignment to the other prisoner of a large part of the land so conveyed to G. for a long term of years; but this deed was falsely antedated before the conveyance by R. and B. to G., and upon this deed the prisoners resisted G.'s title to possession of this part of the land: Held, that this deed so antedated for the purpose of defrauding G. amounted to forgery. *Reg. v. Ritson*, Cr.Ap.Ct. 352.

*Acquittance—Receipt—24 & 25 Vict. c. 98, s. 23.*—A document, called a "clearance," issued to members of the Ancient Order of Foresters Friendly Society, certified that the member had paid all his dues and demands, and authorised any court of the order to accept the bearer as a clearance member: Held, that this was not the subject of forgery within the 24 & 25 Vict. c. 98, s. 23, as an acquittance or receipt. *Reg. v. French*. Cr.Ap.Ct. 472.

24 & 25 Vict. c. 98, s. 24—*Written request to pay money without authority.*—A. deposited with a building society 460*l.* for two years at interest, through the prisoner, who was an agent of the society. Having obtained the deposit note from A., who gave it up on receiving an accountable receipt for 500*l.*, being made up by the 460*l.* and interest, the prisoner wrote without authority the following document: "Received of the S. L. Building Society the sum of 417*l.* 13*s.* on account of my share, No. 8071, pp. Susey A., Wm. Kay," and obtained 417*l.* 13*s.* by means thereof and giving up the deposit note. The jury having found that by the custom of the society such documents were treated as an "authority to pay," and as a "warrant to pay," and as a "request to pay," money, the prisoner was convicted under the 24 & 25 Vict. c. 98, s. 24. Held that the conviction was right. *Reg. v. Kay*. Cr.Ap.Ct. 529.

*Evidence—Comparison of handwriting—Imperfect cheque.*—Upon an indictment for forging a cheque for 60*l.* 10*s.*, evidence of the number of the notes in which it was paid, was rejected in consequence of the original entry not being forthcoming at the trial, and, *per* Blackburn, J., that it was an unreasonable application to have the trial adjourned, to supply such a deficiency: Held, further, that copybooks found at the prisoner's house containing writing by the prisoner, Henry Harvey, and produced by a policeman, could not be received in order to compare with the forged cheque, upon the authority of *Reg.*

*v. Wilbain* (9 Cox Crim. Cas. 448, Irish), where it was held that policemen cannot give evidence as experts; and it was rejected, notwithstanding 28 Vict. c. 18, s. 8, no other expert being called. *Reg. v. Harvey*. Blackburn, J. 546.

*Railway ticket—Receipt or acquittance.*—An ordinary railway ticket is not an acquittance or receipt for money within the Forgery Act (24 & 25 Vict. c. 98, s. 23). *Reg. v. Gooden*. Cleasby, B. 672.

## FRAUD.

(See CONSPIRACY.)

## GAME.

*Night poaching—Limitation of proceedings.*—9 Geo. 4, c. 69, s. 4.—J. C. was indicted for night poaching on the 6th of February, 1863. He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, and to move in arrest of judgment, upon the ground that the proceedings against him had not been commenced within twelve calendar months, as directed by the 4th section of 9 Geo. 4, c. 69. Held (*per* Byles, J.), that the application to withdraw the plea was one which ought to be granted, and that, as no warrant and information was produced showing that proceedings had been commenced within twelve months, the objection was fatal. *Quære*, at what time during the trial ought such an objection to be taken? *Reg. v. Casbolt*. Byles, J. 385.

## GRAND JURY.

Practice of, 209.

## GUNPOWDER.

(See EXPLOSIVE SUBSTANCE, 302.)

## HABEAS CORPUS.

*Escape—Habeas Corpus Act—Warrant—Arrest—Practice.*—A warrant by the Lords Justices General of Ireland, under "The Habeas Corpus Suspension Act (Ireland), 1866," is good, although signed by one only of the three Lords Justices; as the exception in the Queen's patent, empowering "one or two of them, in the absence of the other or others of them, occasioned by sickness or any other necessary cause, full power and authority to act, perform, and do all and every act, matter, or thing to the said



office appertaining," is sufficient to satisfy the provisions of the Act requiring signature by the chief governor or governors of Ireland for the time being. The fact that the warrant is signed by only one of the Lords Justices is sufficient to raise a presumption that the necessity provided for by the exception in the patent has actually arisen. The prisoner was asked by a policeman to come into his (the prisoner's) own parlour and there told that the sub-inspector wanted to see him. He asked what he wanted, and was told that he would hear from himself. No mention was made of a warrant being out, but the prisoner said "May I consider myself under arrest?" and the constable said, "You may." The sub-inspector came in afterwards and produced a paper, which he told the prisoner was a warrant. The prisoner made no submission, but immediately leaped out of the window: Held, that this proved an arrest and escape. A warrant of this kind is criminal process, so as to make an escape from custody under it an indictable offence. *Reg. v. Nugent. Battersby, J.* 64.

#### HABITUAL CRIMINALS ACT.

32 & 33 Vict. c. 99, s. 11—*Receiving stolen goods—Bank-notes—Evidence of guilty receipt—Previous conviction—Recent possession.*—First. On an indictment for stealing a bank-note and receiving it, knowing it to have been stolen, *quære*, whether the 11th section of the Habitual Criminals Act applies, bank-notes not being goods? Secondly. Assuming the enactment to apply, *quære*, whether it applies where the note was not found in the possession of the prisoner when he was arrested or charged with the offence? Thirdly. Assuming that the enactment might apply in such a case, *quære*, whether it applies in a case where there is a count for stealing the note, and not merely for receiving it? Fourthly. The enactment, in case of a previous conviction, has not the effect of throwing upon the prisoner to prove that when he received the note he did not know it to have been stolen, there being no words to that effect in the operative part of the clause. *Reg. v. Harwood. Keating, J.* 388.

Sect. 11—*Receiver of stolen goods—Previous conviction—Notice to prisoner.*—A notice to a person charged with feloniously receiving stolen goods under sect. 11 of 32 & 33 Vict. c. 99 (the Habitual Criminals

Act) that proof is intended to be given against him of a previous conviction, and that he will be deemed to have known such goods to have been stolen until he has proved the contrary, does not dispense with evidence of guilty knowledge on the part of the prosecution. *Reg. v. Davis. Cr.Ap.Ct.* 578.

#### HIGH SEAS, OFFENCE ON.

(See ADMIRALTY.)

#### HIGHWAY.

*Repair—Evidence as to liability of parish to repair.*—On an indictment against a township for non-repair of a common and ancient highway, it was proved that the lane had always been used as a common highway, but it was admitted that the township had never repaired this particular highway, and that it had been repaired by private persons occasionally: Held, that the highway being in use previous to the 5 & 6 Will. 4, c. 50, s. 23, proof of repair by the township was not necessary to support a conviction. *Reg. v. The Inhabitants of Newbold. Cr.Ap.Ct.* 231.

#### HOUSEBREAKING.

*Implements of—24 & 25 Vict. c. 96, s. 58—Possession.*—Where several persons are found out together by night for the common purpose of housebreaking, and one only is in possession of the housebreaking implements, all may be found guilty of the misdemeanour of being found by night in possession of implements of housebreaking without lawful excuse (24 & 25 Vict. c. 96, s. 58), for the possession of one is in such case the possession of all. *Reg. v. Thompson. Cr.Ap.Ct.* 362.

#### HUSBAND AND WIFE.

Wife acting under control of her husband in larceny. 99.

#### IMPLEMENTS OF HOUSEBREAKING.

(See HOUSEBREAKING.)

#### INDECENCY.

*Indecent exposure in a public place—Urinal.*—The prisoners committed a gross act of lewdness in an inclosed urinal, divided into compartments, adjoining to a public footway in a public park. The public had access to the urinal: Held, that the urinal

was a public place, and that the commission of the indecency therein was indictable. *Reg. v. Harris and Cocks.* Cr.Ap.Ct. 659.

### JURISDICTION.

Of justices on a complaint for being on land in pursuit of game. 93.

Question of title to land. 493.

### LARCENY.

*Stealing from a large quantity—Inability to swear to any loss.*—Prisoner was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl-house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed over night, was found open in the morning. The spot where the prisoner was found was 1200 yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any: Held, that there was evidence to support a conviction for larceny. *Reg. v. Mockford.* 16.

*Or false pretences—Property—When not parted with.*—Prisoner and a confederate went to prosecutor's shop to buy something, and put down a florin in payment. Prosecutor put the florin into the till and placed the change on the counter, which the prisoner took up. The confederate said, "You need not have changed," and threw down a penny on the counter, which the prisoner took up, and put a sixpence in silver and sixpence in copper down, and asked prosecutor to give him a shilling for it. Prosecutor took a shilling from the till, and put it on the counter, when prisoner said, "You may as well give me the florin back, and take it all." Prosecutor took the florin from the till, and put it on the counter, expecting to receive two shillings of the prisoner's money in lieu of it. Prisoner took up the florin and prosecutor took up the silver sixpence, and the sixpence in copper, and the shilling put down by herself, and was putting them in the drawer when she saw that she had only got one shilling of the prisoner's money and her own shilling; but at that moment her attention was diverted by the confederate, and both confederate and prisoner quitted the shop: Held, that this

was a case of larceny, for the transaction of exchange was not complete; prosecutor had not parted with the property in the florin. *Reg. v. McKale.* Cr.Ap.Ct. 32.

*Jurisdiction—Transmission of stolen property into another county—Railway—*24 & 25 Vict. c. 96, s. 114.—The prisoner stole a watch in Liverpool, and sent it, with other things, by railway, to a confederate in Middlesex: Held, that the prisoner was triable in Middlesex, although there was no evidence that he had left Liverpool. *Reg. v. Rogers and others.* Cr.Ap.Ct. 38.

*Evidence.*—The prisoner's wife hired a bedstead at 1s. per week, and within a fortnight afterwards the prisoner sold it to a broker, his wife being present at the sale. Two days after the sale the wife paid 1s. for a week's hire, being all that was paid. There was no evidence that the prisoner knew that the bedstead had only been hired: Held, that a conviction of the prisoner for larceny could not be sustained. *Reg. v. Halford.* 88.

*Wife not acting under control of her husband.*—Husband and wife were jointly indicted for stealing. The husband was in the employ of the prosecutors, and was seen near the spot when the property stolen arrived at the prosecutor's. The next day the wife was seen near the spot where her husband was engaged on his work. She was at a place where there was no road, with a bundle concealed, and was followed home. On the following day she pledged the stolen property at two different places. At one of the places where she was not known she pledged in a false name: Held, that upon this evidence the wife might be convicted of stealing the property. *Reg. v. Cohen.* 99.

*Lost property.*—A. dropped a sovereign on a country road during the night time; she did not stop to look for it, but on the following morning she started to go to the spot in the hope of finding it. The prisoner picked it up, and said to his companion, "It would just make his week up;" they walked on and met A. on her way to the spot where she lost the sovereign. From what then passed between A. and the prisoner and his companion, the fact that the prisoner had got A.'s sovereign was brought to the prisoner's knowledge; but he denied having found it. Subsequently he was taxed with having done so: but he would not admit



it, equivocated, and declined to give it up: Held (on the authority of *Thurborn's case*), that the prisoner could not be convicted of larceny, as at the time the prisoner picked up the sovereign, although intending to appropriate it to his own use, he did not know, and had not the means of knowing, who the owner was. *Reg. v. Glyde*. Cr.Ap.Ct. 103.

*Adulterer—Venué*.—A wife took her husband's goods from Notting-hill, and she was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession. There was no evidence that they were under his control at any place within the jurisdiction of the Central Criminal Court: Held, that court had no jurisdiction to try the prisoner for the present offence. *Reg. v. Prince*. The Recorder. 145.

*Young partridges*.—Partridges were reared from eggs by a common hen; they could fly a little, but still remained with the hen as her brood, and slept under her wings at night, and from their inability to escape were practically in the power and dominion of the prosecutor: Held, that they were the subject of larceny. *Reg. v. Shackle*. Cr.Ap.Ct. 189.

*Agent parting with property*.—A cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine: Where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly, it does not amount to the crime of larceny. *Reg. v. Prince*. Cr.Ap.Ct. 193.

*Venue—Guernsey—Receiving*.—Indictment for larceny and receiving. The prisoner had stolen goods in Guernsey and brought them to England, where he was taken and committed for trial: Held, that Guernsey not being a part of the United Kingdom, the prisoner could not be convicted of larceny for having them in possession here, nor of receiving in England the goods so stolen in Guernsey. *Reg. v. Debruil and another*. Byles, J. 207.

*By a bailee—Indictment*.—M. was the owner of a wrecked ship. A. contracted with M. to save and recover the wrecked property. A. made a sub-contract with R. C. to act as diver and carry on the works of salvage; all goods saved to be forwarded to A., and the remuneration to be a percentage on the goods saved, but R. C. always to retain £150 as a guarantee. In his absence

R. C. put his son, the defendant, in charge of the wreck. The defendant corresponded with A. as to the sale of the salvage, and he was addressed by A. as a responsible party under the contract. A. deposed, however, that he had always considered R. C. as the party liable on the contract. The defendant sold and appropriated part of the salvage. The jury found that he did so *animo furandi*, but no question was asked them as to whether he was a bailee of A.: Held (*dissentientibus* Fitzgerald, B., and George, J.), that there was sufficient evidence to show that the defendant was a bailee so as to make him liable for larceny under the 3rd section of the Larceny Act: Held, also, that the property was rightly laid in M. *Reg. v. Clegg*. Cr.Ap.Ct. Ir. 212.

*By Finding*.—The prisoner's child found six sovereigns in the street, which she brought to the prisoner. The latter counted it, and told some bystanders that the child had found a sovereign, and offered to treat them. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. Two hours afterwards the owner made hue-and-cry in the vicinity. On the same evening the prisoner was told that a woman had lost money; the prisoner told her informant to mind her own business, and gave her half a sovereign for herself. Prisoner admitted, on arrest, that she had got the money from the child: Held, that these facts did not warrant a conviction for larceny, as there was nothing to show that at the time of the finding the prisoner had reason to think that the owner could be found (Fitzgerald, J., Pigot, C.B., and Fitzgerald, B., *dissentientibus*). *Reg. v. Clyde*, discussed. *Reg. v. Deaves*. Cr. Ap.Ct. Ir. 227.

*Continuous Act—24 & 25 Vict. c. 96, s. 6*.—By means of a secret junction pipe with the main of a gas company a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years: Held, on an indictment for stealing 1000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time; and that the 24 & 25 Vict. c. 96, as to the prosecutor's electing on three separate takings within six months did not apply. *Reg. v. Firth*. Cr.Ap.Ct. 234.

*Writ of restitution — Larceny—Jurisdiction of Court of Queen's Bench—24 & 25 Vict. c. 96, s. 100.*—The jurisdiction of the Court of Queen's Bench to issue writs of restitution in respect of property stolen was limited to cases where an appeal of robbery had been made, and since the abolition of appeals of robbery no longer exists. The effect of the enactment of the 21 Hen. 8, c. 11, that the owner "shall be restored to the property" stolen from him, and of the similar enactments in 7 & 8 Geo. 4, c. 29, s. 57, and 24 & 25 Vict. c. 96, s. 100, is merely to vest in him the right to the stolen property, leaving him to bring his action or to pursue the remedies pointed out by those enactments. *Walker v. The Mayor of London.* Q.B. 280.

*Servant—Appropriation of money to his own use—Intent.*—Money was given to the prisoner for the purpose of paying turnpike tolls at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not—that he had gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved as to whether the facts proved a larceny that the question of felonious intention had been distinctly left to the jury, this court quashed the conviction. *Reg. v. Deering.* Cr.Ap.Ct. 298.

*Obtaining money under influence of a threat —Mock auction.*—A woman went into a mock auction room, where the prisoner professed to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25s. A man standing between the woman and the door said to the prisoner that she had bid 26s. for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it before she would be allowed to go out, and she was prevented from going out. She then paid 26s. to the prisoner because she was afraid, and left with the cloth: Held, that these facts were sufficient to sustain a conviction for larceny. *Reg. v. MacGrath.* Cr.Ap.Ct. 347.

*Indictment—Election—Continuous taking—24 & 25 Vict. c. 96, s. 6.*—An indictment charged an assistant to a photographer

with stealing on a certain day divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that they were found in the prisoner's possession on the 17th of January, 1870, and that one particular article could not have been taken before March, 1868: Held that this was not a case in which the prosecutor should be put to elect upon which articles to proceed under 24 & 25 Vict. c. 96, s. 6. *Reg. v. Henwood.* Cr.Ap.Ct. 526.

*Taking under claim of right—Question for the jury.*—Upon an indictment for larceny, it appeared that the prisoner had been intrusted by the wife of the prosecutor to repair an umbrella. After the repairs were finished, and it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it: Held that, if the jury were of opinion that the taking by the prisoner was an honest assertion of his right, they were to find him not guilty; but if it was only a colourable pretence to obtain possession, then to convict him. *Reg. v. Wade.* Blackburn, J. 549.

*Birds feræ naturæ—Indictment—Evidence.*—The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive, but in a dying state: Held, that the indictment was not proved. *Reg. v. Roe.* Cr.Ap.Ct. 554.

*Oyster bed in a tidal river—Proof of separate fishery.*—In support of an indictment for stealing oysters in a tidal river, it is sufficient to prove ownership by oral evidence, as, e.g., that the prosecutor and his father, for forty-five years since 1815, had exercised the exclusive right of oyster fishing in the *locus in quo*, and that in 1846 an action had been brought to try the right, and the verdict given in favour of the prosecutor. *Reg. v. Downing.* Cr.Ap.Ct. 580.

*Bailee—Deposit or sale—Fraudulent conversion—24 & 25 Vict. c. 96, s. 3.*—A. delivered two brooches to the prisoner to sell for him at 200l. for one, and 115l. for the other, and the prisoner was to have them for a week for that purpose; but two or three days' grace might be allowed. After ten days had elapsed, the prisoner

sold them, with other jewellery, for 250*l.*, but arranged with the vendee that he might redeem the brooches for 110*l.* before September: Held, that this amounted to a fraudulent conversion of the brooches to his own use by a bailee within 24 & 25 Vict. c. 96, s. 3. *Reg. v. Henderson.* Cr. Ap.Ct. 593.

*Obtaining property by a trick.*—The prosecutor met a man and walked with him. During the walk the man picked up a purse which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner, who opened it, and there appeared to be about 40*l.* in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public-house and had some drink. Prisoner then showed some money and said, if the man would let him have 10*l.*, and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be 10*l.* in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the 10*l.* back and 5*l.* more. Prisoner then said he would do the same for the prosecutor, and by that means obtained 3*l.* in gold and the prosecutor's watch and chain from him. The prisoner and the man then left the public-house, and made off with the 3*l.* and the watch and chain. At the trial, the prosecutor said he handed the 3*l.* and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him 5*l.*: Held, that the prisoner was properly convicted of larceny upon this evidence. *Reg. v. Hazell.* Cr. Ap.Ct. 597.

#### LUNATIC.

*Receiving into an unlicensed house*—8 & 9 Vict. c. 100, s. 90.—C. was placed in the house of a medical man as an invalid; the house not being licensed, or registered for the reception of lunatic patients. C.'s mind was quite imbecile, from natural causes, aggravated by intemperance, and he allowed himself to be kept in a state of revolting filthiness; but it did not appear that he laboured under any delusion or mental aberration, nor was he subject to fits of frenzy or violence: Held that C. was a lunatic within the meaning of 8 & 9 Vict. c. 100, s. 90, and that the medical man was liable to the charge of receiving C. to board and lodge in an unlicensed house. *Reg. v. Shaw.* Cr. Ap.Ct. 109.

#### MALICIOUS INJURY.

*To trees*—Damage exceeding 5*l.*—24 & 25 Vict. c. 95, s. 32.—Under the 24 & 25 Vict. c. 95, s. 32, which makes it an indictable offence to steal, or cut, &c., or damage any tree, &c., where the value of the articles stolen, or the injury done, shall exceed 5*l.*, the respective values of several trees, or of the damage thereto, may be added to make up the 5*l.*, in case the trees were cut down, or the damage done as part of one continuous transaction. *Reg. v. Shepherd.* Cr. Ap.Ct. 119.

#### MALICIOUSLY WOUNDING.

*Inflicting grievous bodily harm*—Common assault.—Upon an indictment under 24 & 25 Vict. c. 100, s. 20, for unlawfully and maliciously wounding or inflicting grievous bodily harm, a verdict for a common assault may be returned. *Reg. v. Taylor, Reg. v. Canwell and Dunn.* 261, 263.

#### MANSLAUGHTER.

*Evidence.*—The prisoner was charged with manslaughter. The evidence showed that the prisoner had struck the deceased twice with a heavy stick, that he had afterwards left him asleep by the side of a small fire in a country by-lane during the whole of a frosty night in January, and the next morning, finding him just alive, put him under some straw in a barn, where his body was found some months after. The jury were directed that if the death of the deceased had resulted from the beating, or from the exposure during the night in question, such exposure being the result of the prisoner's criminal negligence, or from the prisoner leaving the boy under the straw ill, but not dead, the prisoner was guilty of manslaughter. *Reg. v. Martin.* Byles, J. 136.

*Foreigner*—British Ship—Jurisdiction. — A foreigner, one of the crew of a British ship, committed manslaughter on board a British ship while it was in a tidal river in the empire of France. The ship was in a part of the river where the tide ebbs and flows, and where great ships go: Held, that the Central Criminal Court had jurisdiction to try the offender. *Reg. v. Anderson.* Cr. Ap.Ct. 198.

*Indictment*—Act of omission—Private servant — Tramway crossing turnpike road.—In an indictment for manslaughter it is not

necessary that the indictment should specifically charge that it was by an act of omission. The prisoner, as the private servant of B., the owner of a tramway crossing a public road, was entrusted to watch it. While he was absent from his duty an accident happened, and C. was killed. The private Act did not require B. to watch the tramway: Held that there was no duty between B. and the public, and, therefore, that the prisoner was not guilty of negligence. *Reg. v. Smith. Lush, J.* 210.

*Correction of child by father.*—An infant, two years and a half old, is not capable of appreciating correction; a father, therefore, is not justified in correcting it, and if the infant dies owing to such correction, the father is guilty of manslaughter. *Reg. v. Griffin. Martin, B.* 402.

*Contributory negligence by deceased.*—If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge; and if by culpably negligent driving he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the horse, and thereby assisted in bringing about the accident. Even if the doctrine of contributory negligence applies to criminal cases (as to which point—*quære?*) yet there is no contributory negligence on the part of anyone in merely getting into a vehicle and allowing himself to be driven, although the driver be perceptibly drunk. *Reg. v. Jones. Lush, J.* 544.

## MASTER AND WORKMAN.

Forcing workmen to leave employment—*Conspiracy.* 325.

## MISDEMEANOUR.

*Previous conviction for felony.*—It is not competent for a prosecutor in an indictment for misdemeanour to charge a previous conviction of the accused for felony, and support that charge by such evidence as is authorised by 24 & 25 Vict. c. 96, s. 116: (*Reg. v. Summers*, 19 L. T. N. S. 799, Cr. Cas. R.; 3 W. N. 34.) When a conviction founded on such an indictment comes before this Court, such conviction must be quashed, as the Court has no power to

amend the indictment. *Reg. v. Garland. Cr.Ap.Ct.* 224.

Previous conviction—Penal servitude. 248.

## MURDER.

*Conspiracy to liberate a prisoner—Acts of that prisoner.*—A number of persons were charged with murder committed by an act done in the course of a conspiracy for the purpose of liberating a prisoner, of which conspiracy he was cognisant: Held, that acts of that prisoner, within the prison, and articles found upon him, were admissible in evidence against the persons so charged. *Reg. v. Desmond and others. Cockburn, C.J. Bramwell, B.* 146.

*Shooting—Intent to kill—Evidence.*—Where a person fires at another a firearm knowing it to be loaded, and therefore intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and if in such case the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is manslaughter. *Reg. v. Campbell. Keating, J.* 323.

*Provocation—Manslaughter.*—When a person has killed another with a deadly weapon, even upon sudden passion, the question as to the sufficiency of provocation to reduce the crime to manslaughter is not merely whether there was passion in point of fact, but whether there was such provocation as might naturally kindle ungovernable passion in the mind of any ordinary and reasonable man. Such provocation must be something serious—as a blow; and mere words, or gestures, not accompanied with anything of such a serious character, will not, in point of law, be sufficient to reduce the crime to manslaughter. Where there is the intention to kill (as shown by the use of a deadly weapon, and the infliction of a fatal blow in a mortal part), and there is absence of such serious provocation as might naturally kindle ungovernable passion in the mind of a reasonable man, the crime is murder. *Reg. v. Welsh. Keating, J.* 336.

*Evidence—Use of deadly weapon—Intent to kill—Defence on the ground of insanity or homicidal impulse.*—On an indictment for murder, it being proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive,



and that he had been addicted to drink, and had been suffering under depression: Held, that that this was not enough to raise the defence of insanity; that the sole question was, whether the prisoner fired the gun intending to kill, and that his expressions soon after the act were evidence of this, and that alleged inadequacy of motive was immaterial, the question being not motive but intent. *Reg. v. Dixon*. Cr.Ap.Ct. 341.

*Implied malice—Provocation—Receiving a blow.*—If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and, on such renewal, uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other, having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter. *Reg. v. Selten. Hannen, J.* 674.

### MUTINY.

*Piracy—Confinement—Revolt—Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, part 3, ss. 17, 18).*—Where an indictment contains counts for offences within the Admiralty jurisdiction, and others for offences on the high seas, the prosecution will not be put to their election as to which set of counts they will proceed upon. In an indictment for confining a captain of a ship, "constructive" confinement will satisfy the requirements of the statute, and this will be supported by evidence that, although no force was used, the captain was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel. The Merchant Shipping Act (17 & 18 Vict. c. 104, part 3, ss. 17, 18) does not apply to cases where acts of violence towards the officers, and deprivation of the captain's command take place. *Reg. v. Jones and others. Bovill, C.J.* 393.

### NIGHT POACHING.

(See GAME.)

### NUISANCE.

*Obstruction of footway—Nature of obstruction—Statutable authority—Reasonable time—Evidence.*—On an indictment for a nuisance in a highway, by putting and keeping steps on the footpath on account of a difference of level, the defence set up being an authority given by a local act to make certain alterations: Held, that it was, nevertheless, a question for the jury whether, under all the circumstances, the alterations had been carried out with reasonable care. If what might have been excused as temporary had been kept up an unreasonable time, the defence ceased: Held, also, that the lapse of time, the nature of the obstruction, and the other circumstances attending it, were sufficient evidence as to the unreasonableness of the time. *Reg. v. Burt. Q.B.* 399.

### OBSCENE PUBLICATIONS.

20 & 21 Vict. c. 83, s. 1—*Seizure of obscene books—Intention of the possessor—Order for destruction of books.*—When an Act of Parliament prohibits a certain thing from being done, it is no answer on the part of the person who wilfully does the thing prohibited that he had no improper motive in doing it. By the 20 & 21 Vict. c. 83 (Sale of Obscene Books, &c., Prevention Act), s. 1, it is enacted that it shall be lawful for any two justices upon information that the complainant has reason to believe, and does believe, that any obscene books are kept in any house for the purpose of sale, and that one or more articles of the like character have been sold, and upon the justices being satisfied that any of such articles are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by warrant to a constable to enter into such house, and to search for and seize all such books, and to carry them before such justices, who are to summon the occupier of the house to show cause why the articles seized should not be destroyed; and upon the hearing power is given to the justices to order such articles to be destroyed accordingly. The appellant was proceeded against under the Act for having in his possession a number of copies of a book called "The Confessional Unmasked," and the justices, upon the hearing, ordered that the copies seized should be destroyed. Upon appeal against this order to the quarter sessions,

the Recorder quashed the order, subject to a case for the opinion of the Queen's Bench, which stated, "About one-half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the greater half of the pamphlet is obscene in fact, as containing passages which relate to impure and filthy acts, words, and ideas. The appellant did not keep or sell the said pamphlet for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlet as a member of the 'Protestant Electoral Union,' to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the confessional. I was of opinion that, under the circumstances, the sale and distribution of the pamphlets would not be a misdemeanor, nor be proper to be prosecuted as such, and, accordingly, that the possession of them by the appellant was not unlawful within the meaning of the statute. I therefore quashed the order made by the said justices, and directed the pamphlets seized to be returned to the appellant:" Held, that the Recorder was wrong, for that the sale of an obscene book—one calculated to corrupt the minds and morals of those into whose hands it may come—is an indictable misdemeanor, even though a good ulterior object was intended to be served by such sale. *Reg. v. Hicklin and another (Justices of Wolverhampton)* (resps.) Q.B. 19.

#### PENAL SERVITUDE.

*Misdemeanor—Previous conviction—27 & 28 Vict. c. 47, s. 2.*—The prisoner was convicted of the misdemeanor of having inflicted grievous bodily harm on a policeman. After verdict, it appeared from inquiry made by the Court that the prisoner had been previously convicted of felony, but the indictment contained no charge or allegation of such previous conviction. The prisoner was sentenced to five years' penal servitude: Held, that the sentence was not illegal, as being contrary to the 27 & 28 Vict. c. 47, s. 2, which enacts that when any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be seven years. *Reg. v. Summers*. Cr.Ap.Ct. 248.

#### PERSONATION.

*Board of guardians—False personation of a voter—14 & 15 Vict. c. 105, s. 3.*—It is not an offence under sect. 3 of the 14 & 15 Vict. c. 105, to personate a voter who is dead. A. B. was on the rate-book, and entitled to vote for the election of a poor-law guardian, but he died before the election. C. D. filled up the voting paper of A. B. after his death, and delivered it to the proper officer: Held (upon a proper construction of sect. 3 of the 14 & 15 Vict. c. 105), that he did not "personate any person entitled to vote at such election." *Whiteley (app.) v. Chappell (resp.)* Q.B. 307.

*Indictment under 2 Will. 4, c. 53, s. 49, for falsely personating a soldier entitled to prize money.*—On an indictment under the 2 Will. 4, c. 53, s. 49, which enacts that any person who shall knowingly and wilfully personate or falsely assume the name or character of a soldier entitled to prize money, or knowingly aid or assist anyone in so doing, in order to enable him to obtain prize money due to any other party, shall be guilty of felony, two persons were charged, one as having falsely personated a soldier entitled to prize money, and the other as an accessory before the fact, in causing and procuring him to commit the alleged felony. It appeared that the former, at the instigation of the other, had personated the soldier entitled to prize money, but that the other had represented that he was entitled to the prize money; and the defence was that he had purchased it from the soldier, which there was no express evidence to disprove: Held, nevertheless, that both were guilty upon this indictment. *Reg. v. Lake and another*. Lush, J. 333.

#### PERJURY.

*Materiality—False Evidence—Alibi.*—S. was indicted for robbery committed on April 13, at 8.45 p.m., and the prisoner, a witness to prove an alibi on the trial of that indictment, swore that S. was in a house at a distant place at that time, and that S. had lodged at that house nearly two years, and had never been away for more than two or three nights at a time during the period. The prisoner was indicted for perjury on that evidence, and convicted on the assignments of perjury, as to his having lodged at the house for two years, and never having been away more than two or three nights



at a time: Held, that the evidence on these points was material as tending to induce the jury to give greater credit to the material fact of S. being there on the 13th of April at the time in question. *Reg. v. Tyson.* Cr.Ap.Ct. 1.

*Evidence—Affiliation case—Summons.*—On the trial of an indictment for perjury, committed on the hearing of an affiliation summons, under 7 & 8 Vict. c. 101, s. 2, it was proved that an information was duly made, which was put in evidence and read, and that the putative father appeared at the petty sessions, and that upon the hearing of the information the perjury assigned was committed. The summons was not produced, nor service of it proved, but in all other respects the proceedings on the hearing of the information were proved and appeared to have been regular: Held, that it was not necessary that the summons should have been produced to sustain a conviction for perjury on the above evidence. *Reg. v. Smith.* Cr.Ap.Ct. 10.

*Materiality.*—At the trial of an action of trover by P. against prisoner for some steel, the defence was that P., while the steel was lying at a railway station, sent for it and signed a delivery note on receiving it, and then sold it to the prisoner. The prisoner, a witness, swore that the name, P., on the delivery note was P.'s writing, and that he saw him write it. Prisoner was indicted for perjury upon this evidence and found guilty: Held, that the signature to the delivery note was material evidence in the action, upon which perjury could be assigned. *Reg. v. Naylor.* Cr.Ap.Ct. 13.

*Misdescription of justices before whom perjury is alleged to have been committed—Amendment.*—In an indictment, perjury was alleged to have been committed on the hearing of a complaint for entering land for the purpose of taking game, contrary to the Game Act (9 Geo. 4, c. 69), "before L. and J., being justices in and for the county of D., and acting in and for the borough of T., in the said county." In fact, L. and J. were justices for the borough only, and not for the county: Held, that the variance was amendable. It need not appear on the face of the information or complaint in writing that the offence was "entering land for the purpose of taking game there," in order to give the justices jurisdiction before whom perjury is alleged

to have been committed. *Reg. v. Western.* Cr.Ap.Ct. 93.

*Materiality.*—On the trial of A., for perjury, in an affidavit made by him, and used on the taxation of costs, the signature to the affidavit was proved to be in A.'s handwriting, but there was no evidence that A. was the person who swore to the truth of the affidavit. The defendant was then called as a witness, and swore that the affidavit was used before the taxing master when A. was present, and that it was then publicly said that it was A.'s affidavit. The defendant was then indicted for perjury committed on A.'s trial, and the indictment alleged that it was a material question on such trial whether A. was so present before the taxing master, and whether the affidavit was then used in A.'s presence, and whether it was then stated publicly that the affidavit was A.'s. The defendant having been found guilty, it was held, on a case reserved, that the above questions were material ones on the trial of A. *Reg. v. Alsop.* Cr.Ap.Ct. 264.

*False oath at common law—Affidavit under Bills of Sale Act (17 & 18 Vict. c. 36).*—A false oath, sworn in an affidavit for the purpose of procuring the registration of a bill of sale in pursuance of the 17 & 18 Vict. c. 36, is a misdemeanor at common law, of which a person may be found guilty upon an indictment for setting out the facts, and concluding with the usual averment that the prisoner committed "wilful and corrupt perjury," which concluding words may be rejected as surplusage. *Reg. v. Hodgkiss.* Cr.Ap.Ct. 365.

*Information under the 5 & 6 Will. 4, c. 50, s. 78, for furious riding—No penalty imposed by the section.*—The prisoner was indicted for perjury committed by him as a witness on an information before justices against A. B. for furiously riding, contrary to sect. 78 of the 5 & 6 Will. 4, c. 50 (Highway Act): Held, that, as that section gives the justices no jurisdiction to impose any penalty for furious riding, the prisoner did not commit the offence of perjury. *Reg. v. Bacon.* Kelly, C.B. 540.

*Affiliation summons—Jurisdiction of justices—7 & 8 Vict. c. 101, s. 2.*—The mother of a bastard child, born on the 20th of March, 1868, laid an information before a justice on the 18th of April, 1868, against the

defendant, the putative father, under 7 & 8 Vict. c. 101, s. 2. A summons was issued on the same day, but never served, as the defendant could not be found by the process-server to whom the summons was given. On the 14th of January, 1870, about a fortnight after the mother had found out the defendant's address, she applied for and obtained another summons, which was served on the defendant, and he appeared thereto, and, being examined on oath, committed the perjury assigned: Held, that the justices had jurisdiction to hear the complaint, although at the time of service of the summons more than twelve months had elapsed from the birth of the child. *Reg. v. Chugg*. Cr.Ap.Ct. 558.

*Answers before Commissioners under the Corrupt Practices Prevention Act, 1863* (26 Vict. c. 29), s. 7.—The 26 Vict. c. 29, s. 7, enacts in a proviso that no statement made by any person in answer to any question put by or before an election committee or commissioners appointed to inquire into corrupt practices at elections shall, except in cases of indictments for perjury, be admissible in evidence: Held, that the exception was restricted to indictments for perjury committed before the election committee or commissioners, and that true answers before such commissioners could not be used against the witness to support an indictment for perjury committed before another tribunal, such as an inquiry into the validity of an election before a judge. *Reg. v. Buttle*. Cr.Ap.Ct. 566.

*Power of judge to amend indictment*—14 & 15 Vict. c. 100, s. 1.—Where the indictment stated that the prisoner had committed perjury at the hearing of a summons before the magistrates charging a woman with being "drunk," whereas the summons was really for being "drunk and disorderly," the Court held that it had power under 14 & 15 Vict. c. 100, s. 1, to amend the indictment by adding the words "and disorderly." *Reg. v. Tymms*. Lush, J. 645.

*Indictment*.—An indictment for perjury committed at quarter sessions alleged "that at," &c., "a certain indictment for misdemeanor, in which A. was prosecutor and B. and C. defendants, came on to be tried in due form of law, and was then and there tried by a jury, &c., upon which said trial the now defendant appeared as a witness,

and was then duly sworn before the justices," &c.: Held, upon an objection that the court before which the perjury was committed had no jurisdiction, because the indictment did not show the misdemeanor to be one triable at quarter sessions, that the indictment sufficiently alleged the substance of the offence charged against the now defendant, and that the court had competent authority to administer the oath. *Reg. v. Dunning*. Cr.Ap.Ct. 651.

## PIRACY.

(See MUTINY.)

## POACHING.

(See GAME.)

## POLICE.

*Duty of police where a charge of felony is made*.—The plaintiff purchased a ticket at a station on the line of the defendants, a railway company, and a dispute having arisen as to the change given him between the plaintiff and the clerk who gave him the ticket, the clerk called the policeman on duty at the railway, and gave the plaintiff into custody on the charge of attempting to steal money from the till. The charge being afterwards heard and dismissed as without foundation: Held, in an action against the railway company for illegal arrest and false imprisonment, that there was no implied authority on the part of the clerk to give any person into custody on such a charge, and, therefore that the defendants were not liable for this wrongful act of their servant. The duty of the police where charges of felony are preferred commented on and explained. *Allen v. The London and South-Western Railway Company*. Q.B. 621.

## PRACTICE.

*Fees of the Attorney-General—Error*.—There is no legal authority for the fee of fifteen guineas hitherto demanded by the Attorney-General for perusal and consideration of a memorial for a writ of error. *Quere*, may the Attorney-General consider an application for a writ of error made to himself in person as in England; or is he bound to wait for a memorial to the Lord Lieutenant and the reference to him of such memorial? *Reg. v. Costello*. Q.B. Ir. 81.

*Depositions taken abroad—Absence of witnesses—Merchant Shipping Act (17 & 18 Vict. c. 104), s. 270.*—Witnesses, whose evidence had been taken abroad by the British Vice-Consul under the 17 & 18 Vict. c. 104, s. 270, were officers of a British sailing vessel which was stated, by an officer of the Board of Trade, from examination of official records, never to have been in this country: Held, that it was sufficiently proved that the witnesses were not in the United Kingdom, and the depositions were accordingly admitted in evidence. *Reg. v. Conning.* Willes, J. 134.

*Juror summoned in error, but not returned.*

—A juror was summoned in error, but not returned in the panel, and in mistake was sworn to try a case, during the progress of which these facts were discovered. The jury were discharged, and a fresh jury constituted by taking another jurymen in the place of the one who had served in error. *Reg. v. Phillips.* The Recorder. 142.

*Attorney and client—Privilege—Attorney a witness for prosecution.*—A person, the real prosecutor in a case, had communications with her attorney in reference to certain dealings with the prisoner. The attorney was called as a witness for the prosecution: Held, that letters written by the client to her attorney could not be put in evidence by the prisoner's counsel: Held, also, that the prosecutrix and her attorney might be cross-examined in reference to any privileged communications as to which they had given answers to questions addressed to them by the counsel for the prosecution; but not in respect to such matters about which the attorney had volunteered information unasked: Held, also, that matters which transpired during interviews at which the prisoner was present were not privileged. *Reg. v. Leverson.* Gurney, Q.C. 152.

*Offences committed by public servants, &c., beyond seas—Summary jurisdiction of magistrates—Taking of depositions.*—By the stats. 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, offences committed by governors of colonies and others in the public service in places beyond seas may be "prosecuted or inquired of, and heard and determined in his Majesty's Court of King's Bench here, in England, either upon an information exhibited by his Majesty's Attorney-General, or upon an indictment found." By sect. 2 of 11 & 12 Vict. c. 42, "in all cases of crimes or

offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales," any one or more of the justices for the place in which the person charged resides may issue a warrant to apprehend and have him brought before them to answer the charge, and be dealt with according to law. And by sects. 17 and 20 the justice or justices may bind over the witnesses to appear at the next "court of oyer and terminer, or gaol delivery, &c.," to give evidence: Held, that these provisions of 11 & 12 Vict. c. 42, applied to proceedings on charges under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, and that a magistrate of the county within which the accused person resided was bound to investigate such charges. The Court of Queen's Bench, in trying offences under 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, is included within the general words "court of oyer and terminer" in sect. 20 of 11 & 12 Vict. c. 42. *Reg. v. Eyre.* Q.B. 162.

*Grand jury—Witness—Evidence.*—A material witness refused to give any evidence whatever to the grand jury: Held, that the grand jury could not read the deposition of such witness as evidence to enable them to find a bill. *Reg. v. Rendle and another.* Channell, B. 209.

*Writ of error—Misdemeanour—Jurisdiction of Lord Chancellor.*—The granting of a writ of error is part of the prerogative of the Crown. If, therefore, the Attorney-General of England, or the Lord Lieutenant of Ireland refuse to grant it, the Lord Chancellor has no jurisdiction to review that decision. *Re Pigott.* Ct. of Ch. Ir. 311.

*Restitution of stolen goods—24 & 25 Vict. c. 96, s. 100—False pretences.*—The 100th section of 24 & 25 Vict. c. 96 applies to cases of false pretences as well as felony; and the fact that the prisoner parted with the goods to a *bonâ fide* pawnee will not disentitle the original owner to the restitution of the goods. *Reg. v. Stancliffe.* Hayes, J. 318.

*Postponement of trial.*—Even upon an indictment recently found against a soldier for murder, and removed (under the recent Act) into the Central Criminal Court for the purpose of a more speedy trial, on an affidavit by the prisoner's attorney (the case being of recent occurrence) that he

had not had sufficient time to prepare for the defence, and suggesting the possibility of a defence, the trial was postponed. *Reg. v. Taylor*. M. Smith, J. 340.

*Conviction for felony—Venire de novo—New trial—Access of jury to newspapers—Jurisdiction of Supreme Court of New South Wales—Irregularity not avoiding verdict—Remedy.*—The respondent was tried for murder, at a session of oyer and terminer and gaol delivery in New South Wales, and was convicted and sentenced to death. Afterwards an application on behalf of the prisoner was made to the Supreme Court of the colony, sitting *in banco*, for a rule to show cause why a *venire facias de novo* should not issue for the trial of the prisoner. On further affidavits the rule was made absolute, and it was also ordered that a suggestion should be made on the record to the effect that after the jury had been empanelled, and before verdict, the jurors were allowed, during certain adjournments of the court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come: Held (reversing the judgment of the Supreme Court of New South Wales), that the above order vacating the judgment of the verdict, and for a *venire facias de novo* was invalid; First. Because this was substantially an attempt to grant a new trial on the ground that the conviction was unsatisfactory by reason of irregularity in the conduct of the trial, and the discretion to grant new trials does not extend to cases of felony: (*Reg. v. Bertrand*, 16 L.T.Rep.N.S.752, followed.) Secondly. Because the Supreme Court sitting *in banco* had not jurisdiction to take cognisance as a court of appeal of the judgment pronounced at the sessions of oyer and terminer, which had come to an end before the session *in banco* began. Thirdly. Because the evidence was insufficient, in that on mere hearsay information it showed only possible access by the jury to newspapers, without showing that the newspapers contained matter tending to influence the jury improperly, or that

they were ever read by the jury. The cases in which a verdict upon a charge of felony has been held to be a nullity, and a *venire facias de novo* awarded, have been cases of defect of jurisdiction in respect of time, place, or person, or cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon; but there is no authority for holding a verdict of conviction or acquittal in a case of felony, delivered before a competent tribunal in due form, to be a nullity by reason of some conduct on the part of the jury considered unsatisfactory by the court. If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority, with whom rests the discretion either of executing the law or commuting the sentence. *The Attorney-General for New South Wales (app.) v. Michael Murphy (resp.)* Priv. C. 372.

*Right of prosecutor to appear in person—Conspiracy to cheat and defraud the public by circulation of a false prospectus.*—In a criminal prosecution it is not competent to the prosecutor to appear and conduct the case in person. But on an affidavit that it was expected that counsel would be instructed the trial was postponed. On an indictment for conspiracy to cheat and defraud the public by means of the circulation of a false prospectus, to induce them to take shares in a worthless company, the doctrine laid down by Lord Ellenborough as to conspiracy in *Reg. v. Beranger* (3 M. & S.) upheld and applied. On such an indictment, assuming the intent to cheat and defraud, defendants, who were parties to the design, are liable for any of the overt acts done by the others in pursuance of such common design. And the overt act laid being the making and circulating a false prospectus, a defendant, if party to such a design, might be liable, although he took no part in drawing the prospectus, and though he was absent at the time it was circulated; and, therefore: Held, that such a defendant was not, on those grounds, entitled to acquittal, as distinguished from the others. In such a case, the company being formed for the purpose of taking the transfer of a business, the prospectus stating that, in the opinion of the directors (who included the members of the old firm), the business was such as would secure a highly remunerative return to the shareholders; that



the vendors guaranteed deficiencies in the assets and liabilities transferred; and there being no proof to falsify any of the statements in the prospectus, beyond evidence that at the time of the transfer there was an enormous deficiency in the trade assets of the firm, which, however, would, upon estimates (shown to have been honest and reasonable), have been in time made up by other assets and by the partner's private estates, and the business itself being extremely lucrative, and indeed of enormous magnitude: Held, that the substantial question would be, whether the defendants had an honest, although erroneous, belief in this view or intended to cheat and defraud; and that, in the former view, they could not be convicted, as the essence of the charge was the intent to cheat and defraud. *Reg. v. Gurney and others.* Q.B. 414.

*Abandoning counts—Indictment.*—The first count of the indictment charged prisoners under the 9 Geo. 4, c. 69, s. 2, with being found on land at night, armed with a gun for the purpose of taking game, by A. and B., who had lawful authority to apprehend them, and that, A. and B. being about to apprehend them, the prisoners with a weapon assaulted and wounded A. and B. The second count charged an unlawful wounding. The third and fourth counts charged a common assault. At the close of the prosecution the counsel for the prosecution abandoned the last three counts, and elected to stand on the first count. The jury returned a verdict of guilty of night poaching and a common assault. Upon a question raised whether the prisoners could be convicted of a common assault upon the first count: This Court held that, the prosecuting counsel having withdrawn the counts for common assault from the jury, the prisoners ought to be acquitted. *Reg. v. Day and Cox.* Cr.Ap.Ct. 505.

*Evidence of persons jointly indicted.*—Three prisoners were jointly indicted for felony. They pleaded not guilty, and were tried together. Two of the prisoners were allowed to be called as witnesses on behalf of the third. They were all three convicted. *Reg. v. Deeley and others.* Mellor, J. 607.

*Jury de medietate lingue—Peremptory challenge to alien juror*—6 Geo. 4, c. 50, s. 47. —The appellant, on his trial for murder at Melbourne, claimed the right of peremp-

tory challenge to an alien summoned on a *jury de medietate*. Under the colonial statute (The Juries Act, 1865, No. 272), like the stat. 6 Geo. 4, c. 50, s. 47, no alien juror on a *jury de medietate* "shall be liable to be challenged for want of freehold, or of any other qualification required by this Act, but may be challenged for any other cause in like manner as if he were qualified by this Act." The challenge was disallowed, the trial proceeded, and the appellant was convicted. Held (reversing the judgment of the Supreme Court of Victoria, criminal jurisdiction) that the challenge ought to have been allowed; and that the verdict and conviction must be quashed and a *venire de novo* awarded. The composition of a *jury de medietate* is prescribed by statute, but the incidents of the trial, and among them the right of peremptory challenge, are annexed by the common law, and are therefore implied and included in the statute. If it be doubtful whether the right of peremptory challenge has been taken away, the prisoner should have the benefit of the doubt on the general principle "*tutius erratur in mitiori sensu.*" *Levinger (app.) v. The Queen (resp.)* Priv. C. 613.

*Recognizances—Power of judge to discharge defendant from—Corporate body.*—When two defendants, members of a corporate body, entered into their recognizances to appear and plead to an indictment for non-repair of a highway, the judge ordered them to be discharged from such recognizances on the ground that they were entered into *per incuriam*. *Reg. v. The Bury Improvement Commissioners.* Cleasby, B. 641.

*Trial—Defence by counsel—Prisoners themselves addressing the jury—Their counsel afterwards addressing the jury.*—The prisoners, who were defended by counsel, were indicted for maliciously shooting at the prosecutor, and at the conclusion of the evidence for the prosecution, without waiting for their counsel, they themselves addressed the jury in their defence. When they had concluded their observations, the judge permitted their counsel then to address the jury in their behalf. *Reg. v. Stephens and Stephens.* Pigott, B. 699.

## PROPERTY.

Restitution of. 280.

(See PRACTICE.)

## QUARTER SESSIONS.

*Adjournment of business—Adjourning over an intermediate sessions.*—When a matter is properly before the justices at quarter sessions, they have a general power to adjourn the consideration of it to a subsequent sessions, and such subsequent sessions need not be the sessions next following. Presentments having been made at the Epiphany Sessions under sect. 24 of the 28 & 29 Vict. c. 126 (Prisons Act) as to the repairs of two of the county prisons, due notices, &c., were published that such presentments would be taken into consideration at the ensuing Easter sessions. At such sessions accordingly the presentments came on for consideration, and a committee was appointed to consider the whole subject and report to the Michaelmas Quarter Sessions, and the consideration of the report was adjourned till then. At such Michaelmas sessions the committee brought up a report, and a resolution was moved and carried thereupon: Held, that the Easter Quarter Sessions had power to adjourn the consideration of the question to the Michaelmas sessions, and that no fresh notices were necessary with reference to such last-mentioned sessions. *Reg. v. The Justices of Westmoreland.* Q.B. 172.

## RAILWAY.

*Obstruction of—Alteration of signals—24 & 25 Vict. c. 97, s. 36.*—A drunken man got upon a railway and altered the signals, and thereby caused a luggage train to pull up and proceed at a very slow pace: Held (Martin, B., *dissentiente*), that this was a causing of an engine and carriage using a railway to be obstructed within the meaning of the 24 & 25 Vict. c. 97, s. 36. *Reg. v. Hadfield.* Cr.Ap.Ct. 574.

*Endangering safety of passengers on a railway—24 & 25 Vict. c. 100, s. 34.*—Sect. 34 of 24 & 25 Vict. c. 100, enacts that whosoever by any unlawful act, or by any wilful omission or neglect, shall endanger, or cause to be endangered, the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor. Two boys went upon premises of a railway company and began playing with a heavy cart, which was near the line. Having started the cart, it ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to him "Let it

go." The cart ran on without pushing until it passed through a hedge, and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it: Held, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge, and so on to the railway, the boys might be properly convicted under the above statute. *Reg. v. Monaghan and Granger.* Pigott, B. 608.

*Obstructing railway trains—Signalling to stop—24 & 25 Vict. c. 97, s. 36.*—A person improperly went on a line of railway, and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train. The driver was thereupon induced to diminish the speed from twenty to four miles an hour: Held that this amounted to the offence in 24 & 25 Vict. c. 97, s. 36, of unlawfully obstructing an engine or carriage using a railway. *Reg. v. Hardy.* Cr.Ap.Ct. 656.

## RAPE.

*Attempting to know a girl between ten and twelve.* 101.

*Consent—Fraud.*—The prosecutrix, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened she found the man was not her husband, and awoke her husband: Held, that a conviction for a rape upon this evidence could not be sustained. *Reg. v. Barrow.* Cr.Ap.Ct. 191.

*Evidence.*—Although you may cross-examine the prosecutrix as to particular acts of connection with other men, you may not, if she deny it, call witnesses to contradict her. *Reg. v. Robins* (2 M. & Rob. 512) overruled. *Reg. v. Cockcroft.* Willes, J. 410.

*Attempt to commit—Aiding and abetting.*—H. was indicted for rape, and W. for aiding and abetting; both were acquitted of



felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt: Held, that W. was properly convicted. *Reg. v. Hapgood and Wyatt.* Cr.Ap.Ct. 471.

*Carnal knowledge of a girl under twelve—Assault — Indictment.*—An indictment charged that G., in and upon D., a girl above the age of ten, and under the age of twelve, unlawfully did make an assault, and her, the said D., did then unlawfully and carnally know and abuse against the form of the statute: Held, that the indictment contained two charges, one of common assault, and the other of the statutable misdemeanour (24 & 25 Vict. c. 100, s. 51), and that the prisoner might be convicted of a common assault upon it. *Reg. v. Guthrie.* Cr.Ap.Ct. 522.

### RECEIVING.

Bank notes, evidence of—Previous conviction. 388.

Evidence of previous conviction—Habitual Criminals Act. 578.

*Partners*—24 & 25 Vict. c. 96, s. 91, and 31 & 32 Vict. c. 116, s. 1.—A partner stole goods belonging to the firm, and rendered himself liable to be dealt with as a felon under the 31 & 32 Vict. c. 116, s. 1, and sold the same to the prisoner, who knew of their having been stolen. Held, that the prisoner could not be convicted on an indictment for feloniously receiving under the 24 & 25 Vict. c. 96, s. 91, but might have been convicted as an accessory after the fact under the 24 & 25 Vict. c. 94, s. 3, on an indictment properly framed. *Reg. v. Smith.* Cr.Ap.Ct. 511.

### RESTITUTION.

SEE *Practice.*

### RIOT.

*Evidence of liability for.*—On an indictment for riot, persons are not liable merely on account of their having been present and among the mob, even although they had the power of preventing it, unless they by word or act helped, incited, or encouraged it. In such a case, the riot arising out of an election, the evidence against the principal defendant was that he took a strong interest in the election, and was present when there was a serious riot and a systematic attack upon the houses of the

opposite party, and finally upon the polling booths; that many of the rioters were in his own employment; that he did nothing to restrain them, and that when asked to do so he only laughed: Held, that there was no evidence against him, nor against any others who were present, except such as were proved by word or act to have taken part in, helped, or incited to the riotous proceedings. *Reg. v. Atkinson and others.* Kelly, C.B. 330.

### SEDITION.

*Definition and description—Seditious writings copied from foreign newspapers—Intent of publication.*—Liberty of the press means complete freedom to write and publish without censorship or restriction, save such as is absolutely necessary for the preservation of society. When any writing appears to the jury to exceed these limits, it is a seditious libel. "A man may publish whatever a jury of his countrymen think is not blamable." But the judge will advise the jury that those writings are seditious which are calculated and intended to excite hatred or contempt of the Government or the administration of the laws, or to violate the constitution, or to promote insurrection, or create discontent, or bring justice into contempt or embarrass its functions. Governments and courts of justice may form the subject of criticism and censure, but corrupt motives are not to be imputed. Yet, juries are not to adhere to the letter of any definition of seditious libel, but to consider the surrounding circumstances. It might be the province of the press to call attention to the weakness or imbecility of a Government when it was done for the public good. It would also be its duty to complain of a grievance which the public good required to be removed, though the very assertion of a grievance creates discontent to a certain extent. Such writings, though trenching closely upon sedition, should receive the protection of a jury. The law does not excuse the publication in newspapers of writings which are in themselves seditious libels, merely because they are copied from foreign newspapers as items of news. This will be a matter for the jury in considering the criminal intent; but they must also consider the circumstances under which the writings were copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, the nature of the editorial comments accom-

panying them, if any, or their absence, if none, the general tone of the other writings in the newspaper, as the intent of the publisher is to be inferred from the natural consequences of this act. Every person must be taken to intend the natural consequences of his own deliberate act, and therefore the law will not excuse a journalist or newspaper writer on the ground that he writes for hire merely, or that the commercial interest of his paper required the publication of the writings in question. *Reg. v. Sullivan; Reg. v. Pigott. Fitzgerald, J., and Deasy, B.* 44, 51, 60.

### THREAT.

(See LARCENY.)

### TRADES UNIONS.

Embezzlement by officer of. 483.

### TREASON.

*The Treason Felony Act (11 & 12 Vict. c. 12)*  
—Overt acts—Supplying arms to be used in insurrection—Evidence—Jurisdiction.—Under the Treason Felony Act (11 & 12 Vict. c. 12), sending or supplying arms to be used in aid of a treasonable confederacy, having for its object the overthrow of the Queen's government, in any part of the United Kingdom, by force of arms, is a sufficient overt act of a conspiracy to depose or deprive the Queen. And it is not the less so because the arms are sold, and the motive of the sale is pecuniary profit, provided it is known that they are to be used in aid of insurrection. Secret storing of arms and sending them, under feigned addresses, into districts where the confederacy exists, with various contrivances to conceal their ultimate destination, and with knowledge of the confederacy, is evidence of the offence. And bringing arms to London, with a view to their transmission for such purpose: Held, a sufficient overt act within the jurisdiction of the Central Criminal Court. *Reg. v. Davitt and another. Cockburn, C.J.* 676.

### TREASURE TROVE.

*Indictment.*—It is not necessary in an indictment for concealing treasure trove to allege an inquisition before the coroner, or to show the title of the Crown by office found. And a conviction for concealing treasure trove is good, although no proof has been given of such inquisition or office found. *Reg. v. Toole. [Cr. Ap. Ct. Ir. 75.*

### VEXATIOUS INDICTMENTS ACT.

*Refusal of justices to grant summons.*—If, on application to justices for a summons for an indictable offence, they have heard and determined the application, and, on the merits, have declined to grant it, the court will not grant a *mandamus* to compel them to review their decision. *Secus*, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction. *Reg. v. Fawcett and others (Justices of Durham); Ex parte Hodson. Q. B.* 305.

### WIFE.

Acting under coercion of husband. 99.

### WITNESS.

*Prisoner under sentence of death—Incapacity.*—A person under sentence of death is incapable of being a witness. *Reg. v. Webb. Lush, J.* 133.

(See EVIDENCE.)

### WOUNDING.

*Grievous bodily harm—Intent.*—An indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm is good, although it is proved that he mistook A. for somebody else. *Reg. v. Smith (1 Cox Crim. Cas. 51)* followed; *Reg. v. Hewlett (1 F. & F. 91)* overruled. *Reg. v. Stopford. Brett, J.* 643.

## APPENDIX.

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### MISCELLANEOUS PRECEDENTS.

No. I. Indictment against the Governor of a Colony for the Proclamation of Martial Law, and for Acts done whilst such Proclamation was in force, i.

No. II. Indictment for presenting a False Cheque, xi.

### STATUTES.

Prosecution Expenses Act (29 & 30 Vict. c. 52).

An Act to extend the Law relating to the Expenses of Prosecutions, and to make Provision for Expenses on Charges of Felony and certain Misdemeanors before examining Magistrates (23rd July, 1866), xvi.

Reformatory Schools Act (29 & 30 Vict. c. 117).

An Act to consolidate and amend the Acts relating to Reformatory Schools in Great Britain (10th August, 1866), xvii.

Extradition Treaties Act Amendment Act (29 & 30 Vict. c. 121).

An Act for the Amendment of the Law relating to Treaties of Extradition (10th August, 1866), xix.

Criminal Lunatics Act (30 Vict. c. 12).

An Act to amend the Law relating to Criminal Lunatics (12th April, 1867), xxi.

Criminal Law Act (30 & 31 Vict. c. 35).

An Act to remove some Defects in the Administration of the Criminal Law (20th June, 1867), xxiii.

Naval Stores Act (30 & 31 Vict. c. 119).

An Act for the Protection of Naval Stores (20th August, 1867), xxvii.

Merchant Shipping Act (30 & 31 Vict. c. 124).

An Act to amend the Merchant Shipping Act, 1854 (20th August, 1867), xxx.

Documentary Evidence Act (31 & 32 Vict. c. 37).

An Act to amend the Law relating to Documentary Evidence in certain Cases (25th June, 1868), xxxi.

Larceny and Embezzlement Act (31 & 32 Vict. c. 116).

An Act to amend the Law relating to Larceny and Embezzlement (31st July, 1868), xxxiii.

Naval Stores Act (32 Vict. c. 12).

An Act for the Protection of Naval Stores (13th May, 1869), xxxv.

Trades Unions Funds Protection Act (32 & 33 Vict. c. 61).

An Act to protect the Funds of Trades Unions from Embezzlement and Misappropriation (9th August, 1869), xxxvii.

Debtors Act (32 & 33 Vict. c. 62).

An Act for the Abolition of Imprisonment for Debt, for the Punishment of Fraudulent Debtors; and for other purposes (9th August, 1869), xxxviii.

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| <p><b>Evidence Further Amendment Act (32 &amp; 33 Vict. c. 68).</b><br/> An Act for the further amendment of the Law of Evidence (9th August, 1869), xli.</p> <p><b>Criminal Lunatics Act (32 &amp; 33 Vict. c. 78).</b><br/> An Act to amend the Law relating to Criminal Lunatics (9th August, 1869), xlii.</p> <p><b>Clerks of Assize Act (32 &amp; 33 Vict. c. 89).</b><br/> An Act to amend the Law relating to the Office of Clerk of Assize, and Offices united thereto, and to certain Fees upon Orders for payment of Witnesses in Criminal Proceedings (9th August, 1869), xliii.</p> <p><b>Habitual Criminals Act (32 &amp; 33 Vict. c. 99).</b><br/> An Act for the more effectual Prevention of Crime (9th August, 1869), xliv.</p> | <p><b>Forfeitures for Treason and Felony Abolition Act (33 &amp; 34 Vict. c. 23).</b><br/> An Act to abolish Forfeitures for Treason and Felony, and to otherwise amend the Law relating thereto (4th July, 1870), liii.</p> <p><b>Evidence Amendment Act (33 &amp; 34 Vict. c. 49).</b><br/> An Act to explain and amend the "Evidence Further Amendment Act, 1869" (9th August, 1870), lx.</p> <p><b>Extradition Act (33 &amp; 34 Vict. c. 52).</b><br/> An Act for amending the Law relating to the Extradition of Criminals (9th August, 1870), lx.</p> <p><b>Forgery Act (33 &amp; 34 Vict. c. 58).</b><br/> An Act to further amend the Law relating to Indictable Offences by Forgery (9th August, 1870), lxxi.</p> |
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